Supreme Court, U.S.

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No. 97-_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

VICKI G. HUFNAGEL, M.D.,

Petitioner,

vs.

MEDICAL BOARD OF CALIFORNIA,

Respondent.

APPENDIX

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December 30, 1997
(Resubmitted March 20, 1998)

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SECOND APPELLATE DISTRICT,
DIVISION FIVE, NO. B112888
S063501

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
F I L E D

OCT - 1 1997

ROBERT WANDRUFF CLERK
DEPUTY

VICKI G. HUFNAGEL, Petitioner,

v.

MEDICAL BOARD OF CALIFORNIA,
Respondent

Petition for review DENIED.

s/Ronald M. George
Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION FIVE

COURT OF APPEAL
SECOND DIST.
F I L E D
JUN 23, 1994
JOSEPH A. LANE CLERK
T. CARTER
DEPUTY CLERK

VICKI G. HUFNAGEL,	)	B053881
	)	
Petitioner,	)	(Sup. Ct. No.
	)	C730624)
v.	)	
	)	
MEDICAL BOARD OF CALIFORNIA,	)	
	)	
Respondent.	)	
	)	

APPEAL from a judgment of the Superior Court of Los Angeles, David P. Yaffe, Judge. Reversed.

Galam & Taraska, Mike Taraska and Frank Frisenda, Jr. for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, and Antonio J. Merino, Deputy Attorney General, for Defendant and Appellant.

Vicki George Hufnagel, M.D. and the Medical Board of California (formerly Board of Medical Quality Assurance) appeal from a judgment granting in part Dr. Hufnagel's petition for writ of mandate under Code of Civil Procedure section 1094.5 ordering the Board to set aside its decision revoking Dr. Hufnagel's license to practice medicine. We conclude the trial court erred in determining that the Board's findings were insufficient. Therefore, we reverse and remand to the trial court for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

In 1977, Dr. Hufnagel was licensed by the Board as a physician and surgeon. Dr. Hufnagel's specialty is obstetrics/gynecology.

On February 26, 1987, the Executive Director of the Board filed its accusation against Dr. Hufnagel, charging her with unprofessional conduct based on her treatment of, and billings for, a total of 13 patients. Dr. Hufnagel was accused of gross negligence and incompetence[1] with respect to her treatment of seven patients (Marsha C., Jolina C., Rama H., Jan L., Christine S., Joan T. and Marsha W.). She was accused

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[1] Unprofessional conduct includes gross negligence and incompetence. (Bus. & Prof. Code, § 2234, subds. (b) and (d).)

of dishonesty or corruption[2] with respect to her billings for ten patients (Marsha C., Jolina C., Rama H., Joan T., Marsha W., Karen G., Deborah S., Alicia G., Florence C. and Isabell M.) and the consent forms requested of one patient (Debra S.). She was charged with knowingly signing false documents[3] and creating false documents with fraudulent

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[2] Unprofessional conduct includes "[t]he commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon." (Bus. & Prof. Code, § 2234, subd. (e).)

[3] "Violating, attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provision of this chapter" is also considered to be unprofessional conduct. (Bus. & Prof. Code, § 2234, subd. (a).) "Knowingly making or signing any certificate or other document directly or indirectly related to the practice of medicine . . . which falsely represents the existence or nonexistence of a state of facts, constitutes unprofessional conduct." (Bus. & Prof. Code, § 2261.)

intent[4] in connection with her billings, and in some cases her medical records, for nine patients (Marsha C., Jolina C., Rama H., Marsha W., Karen G., Deborah S., Alicia G., Florence C. and Isabell M.), and the consent form requested of one patient (Debra S.).

It was also alleged Dr. Hufnagel was subject to discipline for repeated negligent acts[5] with respect to her conduct in ten cases (Marsha C., Jolina C., Rama H., Jan. L., Christine S., Joan T., Marsha W., Karen G., Deborah S. and Alicia G.), repeated acts of clearly excessive use of diagnostic procedures or treatment[6] with respect to four patients

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[4] "Altering or modifying the medical record of any person, with fraudulent intent, or creating any false medical record, with fraudulent intent, constitutes unprofessional conduct." (Bus. & Prof. Code, § 2262.)

[5] Unprofessional conduct includes repeated negligent acts. (Bus. & Prof. Code § 2234, subd. (c).)

[6] "Repeated acts of clearly excessive prescribed or administering of drugs or treatment, repeated acts of clearly excessive use of diagnostic procedures, or repeated acts of clearly

(Jolina C., Jan. L., Christine S. and Alicia G.) and insurance fraud[7] with respect to eleven patients (Marsha C., Jolina C., Rama H., Joan T., Marsha W., Karen G., Deborah S., Alicia G., Florence

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excessive use of diagnostic or treatment facilities as determined by the standard of the community of licensees is unprofessional conduct for a physician and surgeon . . . ." (Bus. & Prof. Code § 725.)

[7] "It shall constitute unprofessional conduct and grounds for disciplinary action, including suspension or revocation of a license or certificate, for a health care professional to do any of the following in connection with his professional activities: Para. (1) Knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance. Para. (2) Knowingly prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim." (Bus. & Prof. Code. § 810, subd. (a).)

C., Isabell M. and Debra S.).[8]

A hearing was held before an Administrative Law Judge on 27 separate days beginning on November 16, 1987, and ending with oral argument on October 20, 1988. Both parties were represented by counsel and a substantial amount of evidence, both documentary and oral, was introduced. On December 30, 1988, the Administrative Law Judge issued his 26-page Proposed Decision, encompassing 63 findings of fact. The Proposed Decision found that Dr. Hufnagel had committed several acts of unprofessional conduct. Specifically, the Administrative Law Judge found gross negligence with respect to the treatment of one patient (Rama H.), incompetence with respect to the treatment of two patients (Jan L. and Christine S.), clearly excessive use of diagnostic procedures and treatment with respect to two patients (Christine S. and Alicia G.), knowingly making and signing false documents and creating false medical records with fraudulent intent

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[8] Dr. Hufnagel was charged with dishonesty and insurance fraud with respect to the billing of Joan T., but not with knowingly making a false document or with making a false document with fraudulent intent. Whether this was an intentional omission or any oversight is unknown. In any event, the Board found no violations with respect to Joan T.

with respect to the billings for four patients (Marsha C., Jolina C., Rama H., and Isabell M.), knowingly making a false document with respect to the consent form requested of one patient (Debra S.), dishonesty or corruption with respect to the billings for eight patients (Marsha C., Jolina C., Rama H., Marsha W., Deborah S., Alicia G., Florence C., and Isabell M.) and the consent form requested of one patient (Debra S.), insurance fraud with respect to the billings for seven[9] patients (Marsha C., Jolina C., Rama H., Marsha W., Deborah S., Florence C. and Isabell M) and repeated negligent acts with respect to three patients (Rama H., Christine S. and Deborah S.) All of these violations had been charged in the accusation.

The Administrative Law Judge also made findings with respect to credibility. Specifically, he identified which experts he found to be more reliable than others. He also found Dr. Hufnagel's testimony "not only lacked credibility, it lacked candor." The Administrative Law Judge found that Dr. Hufnagel "was thoroughly impeached by other witnesses, written records, prior inconsistent statements, conflicting

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[9] These are seven of the eight patients whose billings supported the findings of dishonesty and corruption. It is possible that the eighth patient, Alicia G., was omitted by typographical error.

answers to the same questions, and outright lack of forthrightness." Although he found that "[c]ause exist[ed] to suspend or revoke" Dr. Hufnagel's license, the Administrative Law Judge recommended a penalty of five years probation.

The Board voted not to adopt the Administrative Law Judge's Proposed Decision. On March 6, 1989, the Board issued its Notice of Non-Adoption of Proposed Decision, indicating that it would review the transcript of the hearing before the Administrative Law Judge and permitting the parties to present written and oral argument.

On August 14, 1989, the Board issued its decision. In many respects, the Board's decision mirrored the Administrative Law Judge's findings of fact. The Board adopted nearly verbatim the findings of the Administrative Law Judge with respect to the credibility of experts and Dr. Hufnagel, However, the Board's findings differed from those of the Administrative Law Judge in several material respects. In addition to agreeing with the finding of gross negligence as to Rama H., the Board also found gross negligence with respect to Dr. Hufnagel's treatment of two other patients (Christine S. and Deborah S.). In addition to agreeing with the findings of incompetence as to Jan L. and Christine S., the Board also found incompetence with respect to Dr. Hufnagel's treatment of four other patients (Marshal C., Jolina C., Karen G.

and Alicia G.). The Board agreed with one finding of excessive use of diagnostic procedures (Christine S.), yet did not find excessive use of diagnostic procedures with respect to a second patient[10](Alicia G.). The Board agreed with the Administrative Law Judge as to the five charges of knowingly making false documents and also found that violations to have been established with respect to another patient (Alicia G.). The Board agreed with the Administrative Law Judge as to all nine findings of dishonesty or corruption. Although the Board made some findings that Dr. Hufnagel created false records with fraudulent intent, no findings of statutory violations were explicitly made nor any discipline imposed for these charges. Likewise, the Board made no findings against Dr. Hufnagel and imposed no discipline for the charges of repeated negligent acts or insurance fraud.

Not all of the charges found proven by the Board had been expressly charged

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[10] The Board agreed with the Administrative Law Judge's findings with respect to what actually occurred in the course of Dr. Hufnagel's treatment of the is patient. However, where the administrative Law Judge concluded these facts constituted excessive hospitalization. the Board determined the violation to be incompetence.

in the accusation. Specifically, the Board determined that Dr. Hufnagel had been grossly negligent with respect to her treatment of Deborah S. and incompetent in her treatment of Karen G. and Alicia G. Although she had been charged with negligence with respect to these patients, incompetence and gross negligence had not been charged.

The Board did not base its choice of penalty on all of the violations taken together as did the Administrative Law Judge. Nor did the Board impose a penalty with respect to each individual violation. Instead, the Board imposed a penalty based on Dr. Hufnagel's treatment of each individual patient. For example, for the established charges of incompetence, dishonesty and false documents in connection with patient Marsha C., the Board imposed revocation. For her individual treatment of each of five other patients (Jolina C., Rama H., Christine S., Karen G. and Deborah S.), Dr. Hufnagel's license was separately revoked. For her treatment of each of four other patients (Marsha W., Florence C.m Isabell M. and Debra S.), Dr. Hufnagel's license was suspended for 60 days. For her individual treatment of each of two patients (Jan L. and Alicia G.), Dr. Hufnagel was placed on five years probation, with an additional penalty of 60 days suspension for one patient (Alicia G.)

At Dr. Hufnagel's request, the Board's order was stayed until October 13, 1989, in order for Dr. Hufnagel to

file a petition for reconsideration. On October 4, 1989, Dr. Hufnagel filed her petition for reconsideration in which she argued the findings were not supported by the evidence and the penalties imposed were unduly harsh. That same day, Dr. Hufnagel filed with the trial court her petition for writ of mandate under Code of Civil Procedure section 1094.5, and her application for an order staying the Board's decision.[11] On October 12, 1989, a stay was granted. On October 17, 1989, the trial court issued an alternative writ of mandate.

After reviewing the administrative record and the pleadings and hearing argument, the trial court issued its ruling on May 18, 1990 (amended nunc pro tunc on June 26, 1990), granting the petition in part. The trial court rejected all of Dr. Hufnagel's procedural challenges to the Board's proceedings. It also rejected her claim that the evidence was insufficient to establish the appropriate standard of care. However, the trial court agreed with Dr. Hufnagel's claim that the Board's decision was facially deficient in that it failed to clearly disclose the basis for its ruling. The trial court concluded that certain findings of violations with respect to the treatment of three patients (Marsha C., Jolina C. and Christine S.), were "entirely

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[11] The petition for reconsideration was apparently denied.

conclusory." The trial court determined that those findings must have been improperly based upon the expert opinions of the Board members, and ordered the findings stricken. With respect to findings relating to two other patients(Karen G. and Deborah S.), the trial court concluded that since there was no explanation for the Board's disagreement with the Administrative Law Judge, whose findings were found to have been supported, such findings were defective and they were likewise ordered stricken. All other findings were found to be supported by the weight of the evidence, after independent review of the record, and were sustained.

With respect to penalty, the trial court upheld all findings with respect to one patient whose treatment was the basis for an order of revocation (Rama H.). However, without all of the other findings which supported revocation orders, the trial court found no basis for revocation. At the hearing, the trial court stated, "I don't think that this court . . . can be certain and this court is not convinced that if Rama H. were the only patient involved in this proceeding, that the [B]oard would have ordered unconditional revocation of the doctor's license to practice medicine."

The trial court issued a writ directing the Board to either strike the

improper findings[12] and the revocation and order five years probation, or to modify the decision by replacing the questioned findings with findings setting forth "the reasons for [the Board's] disagreement with the findings of the Administrative Law Judge and the evidentiary basis for such disagreement." On June 26, 1990, a judgment was entered incorporating these directions. Both parties appealed.

DISCUSSION

Dr. Hufnagel contends that the trial court erred in failing to strike the Board's decision in its entirety and in allowing the Board to conduct further hearings or impose probation. She contends that the Board denied her due process of law by finding her guilty of violations that had not been charged and by failing to make adequate findings. She argues that the remedy for these violations is to strike the Board's entire decision. The Board contends that its findings were sufficient and should not have been stricken. It further contends the trial court erred in refusing to uphold the penalty of revocation based on the findings with

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[12] The particular findings found deficient are numbered IV, VII (Marsha C.), XIII (Jolina C.), XXXI (Christine S.), XLVII (Karen G.) and the last paragraph of L (Deborah S.). They are discussed at length below.

respect to patient Rama H.

Due Process

When a trial court reviewing an administrative proceeding has rejected a petitioner's due process contentions, the appellate court is to assume that the trial court found all facts necessary for its judgment and must determine whether substantial evidence exists to support the trial court's independent determination that there were no due process violations. (Noguchi v. Civil Service Com. (1986) 187 Cal.App.3d 1521, 1536.) "However, when . . . the evidence is substantially undisputed and the fair trial issue presents a question of law, we will exercise our own judgment. [Citation.]" (Vollstedt v. City of Stockton (1990) 220 Cal.App.3d 265, 273.) Thus, to the extent Dr. Hufnagel's due process challenges raise issues of fact, we will review the trial court's determination under substantial evidence review. As to issues of law, we will review the decision de novo.

1. Charging Disparity

Dr. Hufnagel contends she "was entirely denied due process at the administrative level" because the Board found that she committed gross negligence with respect to Deborah S., and incompetence with respect to Alicia G. and Karen G. although those violations had not been charged. "It is well settled . . . that variance between

pleadings and proof is not a basis for reversal unless it prejudicially misleads a party. A variance must be disregarded if the issues on which the decision is actually based were fully and fairly tried." (Franz v. Board of Medical Quality Assurance (1982) 31 Cal.3d 124, 143-144.) Applying this standard, the trial court found "[t]he issues complained of were fully and fairly tried, and petitioner's contention is therefore rejected."

The Board concedes that there was no evidence to support its determination of gross negligence with respect to Deborah S. It therefore does not contest the propriety of that part of the trial court's order striking this finding.

As to the charges of incompetence with respect to Alicia G. and Karen G., substantial evidence exists to support the trial court's conclusion that these charges were fully and fairly tried at the administrative hearing. Dr. Hufnagel's post-hearing brief before the Board clearly demonstrates she not only introduced evidence on the issue of the competence of her treatment of these patients but also argued at length that her treatment of these patients was appropriate. For example, she argued that both Dr. William Hummer and Dr. Frederic Quevedo (her experts) testified there was no deviation from the standard of care with respect to the treatment rendered to Karen G. Dr. Hufnagel was found incompetent because she overreacted to Karen G.'s low heart rate during

surgery by opening her abdomen (performing a laparotomy). Dr. Hufnagel argued that she "did not fail to recognize pre-operative bradycardia [slow heart beat], and the recognition and response to the intro-operative bradycardia was a team response (surgeon, assistant surgeon and anesthesiologist) which was completely within the standard of care." This charge was fully and fairly litigated.

The same is true with respect to patient Alicia G. Dr. Hufnagel was found to have been incompetent because she hospitalized Alicia G., although the latter had exhibited no documented symptoms other than pelvic pain. Dr. Hufnagel's post-hearing brief demonstrates that she offered the testimony of Dr. Hummer and Quevedor to the effect that hospitalization of Alicia G. was indicated and even "an absolute necessity."

Dr. Hufnagel offers no argument that she was prejudiced by the variance in charges, except to contend that she had no notice of these charges because she was "only . . . charged with violations regarding her billing practices" with respect to these patients. In addition to charges related to her billing practices, however, D. Hufnagel had been charged with "repeated acts of negligence in discharging her duties as a physician and surgeon" with respect to her treatment of both of these patients. Therefore, Dr. Hufnagel's contention that she "was never afforded her due process

rights of notice to defend against these charges is rejected.[13]

The trial court correctly found that the variance between the charges and the findings was not prejudicially misleading and did not deprive Dr. Hufnagel of due

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[13] Dr. Hufnagel was put on notice of her precise actions with respect to Karen G. that later formed the basis of the findings of incompetence. The accusation charged that Dr. Hufnagel's "failure to recognize [Karen G.]'s pre[-]operative bradycardia as reflected in the pulse rates of 44 and 60 constitutes negligence and resulted in an overreaction and immediate laparotomy which was not justified by the transient mild bradycardia of 56." The Board concluded that Dr. Hufnagel "was negligent by failing to recognize this patient's pre[-]operative bradycardia, as reflected by pre-op pulse rates of 44 and 60. It was further established that [Dr. Hufnagel] was incompetent due to over-reacting to the patient's bradycardia, and performing a laparotomy."

process of law.[14]

2. Adequacy of Findings

The trial court found the Board's decision to be facially deficient "to the extent that the final decision of [the

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[14] Even if Dr. Hufnagel) were correct that she was denied due process by the variance, she has offered no authority for the proposition that the decision of the Board "should be completely stricken" on account of such error. She relied on Franz v. Board of Medical Quality Assurance, supra, 31 Cal.3d 124, for support. Yet Franz merely held that when an agency has imposed a single discipline for multiple charges, some of which are not supported by the evidence, and there is real doubt whether the same penalty would have been imposed on the proper findings, "the matter will be returned to the agency for redetermination of penalty." (Id. at p. 145.) Neither Franz nor any authority disclosed by independent research supports the conclusion that proper findings must also be stricken when it is determined that some of the Board findings were inappropriate.

Board] differs from the recommended decision of the Administrative Law Judge." Dr. Hufnagel contends that this finding should have resulted in the Board's decision being struck in its entirety. The Board contends that the trial court erred in finding its decision to be deficient. Because we find the Board to be correct in this respect, it is unnecessary to reach Dr. Hufnagel's contention regarding the appropriate remedy.

Any variation between the Administrative Law Judge's decision and the Board's decision is of no relevance. "[F]rom the moment of the agency's rejection thereof, [the Administrative Law Judge's decision] serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof," (Compton v. Board of Trustees (1975) 49 Cal.App.3d 150, 158.) Thus, the trial court erred in comparing the Board's final decision to the Administrative Law Judge's decision. The only scale against which the Board's decision is to be measured is that provided by statute and case law.

a. The Topanga Standard

The California Supreme Court set forth the appropriate standard of review for an administrative agency's findings in Topanga Assn. for a Scenic Community v. County of Los Angeles, (1974) 11 Cal.3d 506. When an agency's decision is challenged in a mandamus proceedings

under Code of Civil Procedure section 1094.5, that statute "clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision." (Id. at pp. 514-515.) The Supreme Court in Topanga concluded that "implicit in [Code of Civil Procedure] § 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. If the Legislature had desired otherwise, it could have declared, as a possible basis for issuing mandamus, the absence of substantial evidence to support the administrative agency's action. By focusing, instead, upon the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route. Reference, in [Code of Civil Procedure] § 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to 'the findings' . . . we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision." (Id at p. 515; see Securities Comm'n v. Chenery Corp. (1943) 318 U.S.

80, 94 ["the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained"].)

Topanga's mandate is violated when the administrative agency merely "provides a pudding of evidentiary facts and concludes without analysis that there are plums somewhere in it demonstrating violation[s]." (American Funeral Concepts v. Board of Funeral Directors & Embalmers (1982) 136 Cal.App.3d 303, 314.) Likewise, if the agency's findings are legally insufficient to support its conclusion that a particular statutory offense occurred, Topanga is violated by a trial court's attempt to uphold the final result by "cutting and pasting its premise upon [the] agency determination founded on a different premise." (American Funeral Concepts v. Board of Funeral Directors & Embalmers, supra, 136 Cal.App.3d at p. 311.) This is so because the purpose of Topanga is to guarantee that when a reviewing court upholds an agency's determination, it does so on the same theory used by that agency.

The findings need only disclose the basis on which the Board's final decision was made. (Pick v. Santa Ana-Tustin Community Hospital (1982) 130 Cal.App.3d 970, 978.) "Though the reviewing court might prefer to have the grounds for the board's determination stated in complete detail. . . . we cannot imply the necessity for such detailed findings in

the absence of a statutory requirement." (Webster v. Board of Dental Examiners (1941) 17 Cal.2d 534, 543-544; see also Savelli v. Board of Medical Examiners (1964) 229 Cal.App.20 124, 134-135.)

To satisfy Topanga, the findings need not be as formal as those in a judicial proceeding. "It is sufficient that the findings enable the reviewing court to determine that the agency found the necessary facts to support its determination of the issues." (Kateen v. Department of Real Estate (1985) 169 Cal.App.3d 481, 485.)

Although findings may be supplemented by reference to the administrative record itself, (Kateen v. Department of Real Estate, supra, 169 Cal.App.3d at p. 485), it is not necessary for them to be so supplemented. The trial court's review of the evidence in a case such as this where a fundamental vested right is at issue is an independent review of the evidence. (Kearl v. Board of Medical Quality Assurance (1986) 189 Cal.App.3d 1040, 1052.) Thus, the trial court is not, in its review of the evidence, restricted to the evidence relied upon by the Board, but must instead review the entire record to determine if the weight of the evidence supports the Board's findings. (Id. at p. 1056.) The Board's decision must contain findings of fact sufficient to enable the trial court to review the evidence to determine if it supports the findings, and to determine whether the findings support the Board's ultimate

action, but there is simply no requirement that the Board cite to the specific evidence on which it relied.

b. The Board's Findings

Evaluated against this standard, the Board's findings were sufficient, and the trial court erred in concluding otherwise. With one exception, each challenged finding specifies the conduct of Dr. Hufnagel which was found to be inappropriate, and the manner in which it was found inappropriate.

Findings IV and VII related to the treatment of Marsha C. This patient had previously undergone, with another physician, a suction curettage for an incomplete abortion. Dr. Hufnagel diagnosed post-operative complications and a possible perforation. When she performed surgery, seven days after the initial operation, she reported evidence of a uterine perforation and attempted repair. The findings state that "[i]t was established that [Dr. Hufnagel]'s attempt to suture the laceration and perforation on this asymptomatic post-abortal patient seven days after the previous procedure constitutes incompetence," and "[i]t was established that [Dr. Hufnagel]'s performance of a uterine suspension on this patient in the face of uterine inflammation and potential infection constitutes incompetence." A trial court is given sufficient guidance from these findings to determine exactly what the evidence

must have established.[15] In reviewing the evidence, the trial court will be required to determine if it supports the factual predicates, e.g., did Dr. Hufnagel perform the procedures; was the patient's condition as stated; and whether those factual predicates support the ultimate factual findings, e.g., was this conduct incompetent. These findings are therefore sufficient under Topanga.

Finding XIII relates to the treatment of Jolina C. Jolina C. had been admitted to the hospital by another physician. Dr. Hufnagel performed a liver biopsy and a laparoscopy (diagnostic examination of the interior of the abdomen). The following day, further surgical procedures were performed. The finding states that "performing two non-emergency surgeries on two consecutive days under the circumstances constitutes incompetency." This finding is preceded by findings specifying which procedures were

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[15] Indeed, there were findings with respect to this patient that identify conduct that was not proven to be gross negligence or incompetence. Thus, the trial court would not be able to support the Board's ultimate conclusion of incompetence even if, upon independent review, it concluded that these other charges were supported by the evidence.

performed on which days, and why some procedures were not performed until the second day. These findings are of sufficient specificity to enable a reviewing court to determine whether they are appropriately supported by the evidence, and are therefore sufficient.

Finding XXXI related to the treatment of Christine S. Dr. Hufnagel admitted this patient to the hospital with a diagnosis of pelvic pain and pelvic mass. She ordered a series of laboratory tests for the patient and performed a diagnostic laparoscopy followed by a laparotomy. During the laparotomy, Dr. Hufnagel made a large cut in the uterus and perform a biopsy. Dr. Hufnagel repaired the uterus and performed a uterine suspension. The finding states "[i]t was established that respondent was negligent in performing the uterine suspension." Finding XXXI does not specify whether Dr. Hufnagel was found negligent in the manner in which she performed the uterine suspension or in her decision to perform it under the circumstances. The ambiguity in this finding would make it possible for a reviewing court to uphold the finding of negligence on a theory different from that relied upon by the Board. Thus, the finding is improper under Topanga. However, any error in this finding is harmless because negligence is not among the statutory violations for which Dr. Hufnagel was punished with respect to this patient. The Board ordered revocation because Dr. Hufnagel's conduct with respect to Christine S. established

gross negligence, incompetence and repeated acts of clearly excessive use of diagnostic procedures.[16] Because no penalty was imposed for the preliminary finding of negligence, whether that finding can be supported is irrelevant.

The above findings (relating to Marsha C., Jolina C. and Christine S.) were determined to be conclusory. The trial court assumed these findings were improperly based on the expert opinions of members of the Board, as was the case in Franz v. Board of Medical Quality Assurance, supra, 31 Cal.3d at page 138. The Franz court concluded this was improper without complete and specific notice to the doctor and an opportunity

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[16] The findings with respect to these other courts are clearly specific enough to allow for review. Gross negligence is based on the finding that "after hearing the true diagnosis of ad[e]nomysis [ingrowth of the uterine mucous membrane into the uterine musculature], [Dr. Hufnagel] wedged out further uterine tissue." Incompetence was based on Dr. Hufnagel's excision of "ugly fatty adhesions from the posterior fundus for cosmetic purposes," which was found to be "not appropriate" and "would further increase the patient's risk of more adhesions."

for the doctor to respond. (Id. at pp. 139-140.) Here, unlike Franz, the Board did not purport to rely on its own medical expertise, but instead simply reached different conclusions from those of the Administrative Law Judge on the same evidence. The Board's findings are sufficient under Topanga and it therefore falls to the trial court to independently review the administrative record to determine if these findings are supported by the evidence.

Additionally, the trial court found two findings insufficient solely because they were contradictory to the findings of the Administrative Law Judge. (The Board has conceded that one such finding is not supported by the evidence and is therefore in error. Thus the propriety of the trial court's decision striking this finding, the last paragraph of finding L. is not before us.) The trial court concluded that the Administrative Law Judge's findings were supported by the testimony of Dr. Hummer. In the absence of any explanation of the Board's "disagreement with said findings and testimony," the Board's findings to the contrary were ordered stricken. As discussed above, this reasoning is faulty because the Administrative Law Judge's decision has been rendered a nullity by the Board's nonacceptance of it. The trial court should have simply determined whether the findings of the Board were sufficient to provide for review, and if so, to review them.

Finding XLVII states that "[i]t was

established that [Dr. Hufnagel] was negligent by failing to recognize [Karen G.]'s pre[-]operative bradycardia, as reflected by pre-op pulse rates of 44 and 60. It was further established that [Dr. Hufnagel] was incompetent due to over-reacting to the patient's bradycardia, and performing a laparotomy. It was also incompetence to continue with multiple surgical procedures when the presumptive diagnosis was that of bradycardia." This finding is clear sufficient to give notice as to the rationale for the Board's decision and to allow appropriate review.

With the exception of finding XXXI, for which no discipline was imposed, all of the challenged findings were sufficient. The trial court therefore erred in ordering these findings stricken. Thus, we will remand to the trial court so that it can determine whether all of the findings are supported by the evidence and whether the finding support the Board's decision.

3. Standard of Care

Dr. Hufnagel also contends that the Board's decision was improper because it did not set forth any facts defining the applicable standard of care against which her conduct was measured. Yet such findings are readily implied from the

Board's decision.[17] When the Board concluded that Dr. Hufnagel's actions constituted gross negligence, the Board impliedly concluded that Dr. Hufnagel's conduct was either an extreme departure from the standard of practice or a lack of even scant care. (See Gore v. Board of Medical Quality Assurance (1980) 110 Cal.App.3d 184, 197 [defining gross negligence].) Whether there was sufficient evidence in the record to support this evaluation of Dr. Hufnagel's conduct is a question for the trial court, in the first instance, to be determined on the exercise of its independent judgment. There is no necessity that explicit findings regarding the standard of care be included in the Board's decision in order to meet the requirements of Topanga.

Dr. Hufnagel recognizes this in her contention that case law mandates "that any findings of the [Board] pursuant to its allegations concerning a breach of the community standard and/or

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[17] A review of the sufficiency of an agency's findings is not limited to the four corners of the agency's decision. (City of Carmel-By-the-Sear v. Board of Supervisors (1977) 71 Cal.App.3d 84, 91-91 [oral remarks made at the hearing, if taped and reduced to a written transcript, can contain findings sufficient to satisfy Topanga.)

incompetence necessitate the existence of evidence establishing such standard." Indeed, Dr. Hufnagel's contention is not that the findings are insufficient to allow the trial court to perform a proper review, but rather that the findings are not supported by the evidence. To the extent that the trial court considered this contention, it was rejected. The trial court concluded that "[a]n examination of the transcript of the administrative proceedings discloses . . . that the applicable standards of care were well articulated by the witnesses."[18] However, because the trial court did not evaluate the evidence with respect to the findings it erroneously found to be insufficient, we will remand for the court to exercise its independent judgment as to whether all of the findings are supported by the weight of the evidence.[19]

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[18] Nor is it always necessary for expert testimony to establish the standard of care. When the questions do not require medical expertise, common sense and lay knowledge can provide the basis for a finding of medical negligence. (Franz v. Board of Medical Quality Assurance, supra, 31 Cal.3d at p. 141.)

[19] While we here reviewing the trial court's determination that the evidence was sufficient to support this

Penalty

A trial court reviews the penalty imposed by an administrative board under an abuse of discretion standard. It must allow the penalty to stand unless it is unsupported by the findings, grossly excessive, arbitrary, capricious or a manifest abuse of discretion. (Williamson v. Board of Medical Quality Assurance (1990) 217 Cal.App.3d 1343, 1347; Richardson v. Board of Supervisors (1988) 203 Cal.App.3d 486, 495.) Even if the penalty is found to be an abuse of discretion, the trial court cannot fix the penalty, but can only remand with directions to issue a fair penalty less then the one found to be excessive. (Richardson v. Board of Supervisors, supra, 203 Cal.App.3d at p. 495.)

If a trial court has determined on an exercise of its independent judgment that the evidence supports the findings of the Board, the question of whether the Board abused its discretion in setting the penalty is one of law. (Williamson v. Board of Medical Quality Assurance,

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finding, Dr. Hufnagel would be required to show that no substantial evidence supports the trial court's conclusion. (Kearl v. Board of Medical Quality Assurance, supra, 189 Cal.App.3d 1040, 1052; Gore v. Board of Medical Quality Assurance, supra, 100 Cal.App.3d at p. 193.)

supra, 217 Cal.App.3d at p. 1356.) If, however, the Board has imposed a single penalty for multiple violations and the trial court has found some of the violations to be unsupported by the evidence, and the trial court has a "real doubt" as to whether the Board would have taken the same action on proper findings, the matter should be returned to the Board for a redetermination of penalty. (Franz v. Board of Medical Quality Assurance, supra, 31 Cal.3d at p. 145.)

The Board contends that the trial court erred in refusing to uphold the penalty of revocation. The Board argues that, unlike the situation in Franz, it did not impose revocation based on all of the charges taken together, but instead imposed revocation six different times base don the six cases of treatment it believed mandated revocation. Because the trial court upheld the Board's findings with respect to one such patient (Rama H.), the Board argues that revocation should have been upheld with respect to that patient.

We agree the trial court erred in finding that a "real doubt" existed as to whether the Board would have imposed the penalty of revocation based solely on the facts of the Rama H. case. The Board's decision clearly stated that "[e]ach order for revocation was evaluated on a separate basis that was independent of the other patient cases." This seems to be an attempt by the Board to avoid the Franz result by clarifying the penalty to be imposed for each separate offense, so

that in the event some charges are not upheld, the penalties for the other remain.

However, we stop short of affirming the penalty of revocation in this instance.[20] It would be difficult to find that the penalty of renovation is not grossly excessive when imposed solely for the treatment of this one patient. The findings of the Board do not indicate that Rama H.'s life was in any danger based on the failure of Dr. Hufnagel to

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[20] We assume, without deciding, substantial evidence supports the trial court's determination that the findings with respect to Rama H. are supported by the weight of the evidence. The Board found that Dr. Hufnagel's treatment of Rama H. was grossly negligent, in that she convinced Rama H. to cancel a necessary hysterectomy and consent instead to Dr. Hufnagel's treatment by myomectomy (tumor removal). Even after the operation, when the facts clearly indicated the necessity for a hysterectomy, Dr. Hufnagel failed to recommend one to Rama H. Additionally, Dr. Hufnagel was found to have been dishonest in her billings submitted for Rama H., billing for several procedures which had not been performed.

recommend of perform a hysterectomy. Although we do not condone a physician's failure to fully inform a patient about necessary treatment and treatment alternatives, a failure to so inform one patient may not be sufficient to justify the revocation of the license of an otherwise competent surgeon. Thus, the penalty of revocation might be excessive if imposed solely on the basis of treatment rendered to Rama H. However, the trial court also upheld numerous dishonest billing charges. The trial court indicated that had the Board based its penalty of revocation on these charges, it would likely have been upheld. However, the Board did not impose a joint penalty for the grossly negligent treatment of Rama H. and the repeated acts of dishonesty. The penalty of revocation might be appropriate under the totality of these circumstances. (Bus. & Prof. Code, § 2306 [authority hearing petition for reinstatement "may consider . . . the offense for which the petitioner was disciplined . . . ."].) Accordingly, it is in the interest of justice that the penalty imposed on Dr. Hufnagel be based upon all violations that are found to be properly supported. The trial court has already upheld several other charges against Dr. Hufnagel, involving dishonesty in her billing practices. Additionally, on remand, the trial court may find that some of the other charges of gross negligence and incompetence are also properly supported by the evidence. Based on these findings, the trial court may determine the penalty originally

imposed by the Board was proper.

DISPOSITION

We reverse the judgment of the trial court granting the writ of mandamus in part. We remand for the trial court to exercise its independent judgment as to whether the Board's findings numbered IV, VII, XIII, and XLVII are supported by the weight of the evidence and to redetermine whether the Board's decision is supported by the totality of the findings found to be appropriately supported. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

s/Margaret Grigon
ACTING P.J.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 5

Daniel E. Lungren, Attorney General
Antonio J. Merino
300 South Spring Street
Los Angeles, CA 90013

RE: Hufnagel V. Georges vs.
State of California
2 Civil B053881
Los Angeles NO. C730624

** REMITTITUR NOTICE **

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 06/23/94 is now final.

** Reversed & Remanded to Trial Court W/Directions. **

The Parties Are to Bear Their Own Costs.

SEPT. 26, 1994

JOSEPH A. LANE, Clerk

s/ by: G. Mercier
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 06/07/96 DEPT. 69

HON. DAVID YAFFE, JUDGE — C. HUDSON DEPUTY CLERK; A. HARRIS, CRT.ASST.

HON. JUDGE PRO TEM 5. — NONE ELECTRONIC RECORDING MONITOR

A. AYALA, CSL DEPUTY SHERIFF — D. CASE REPORTER

1:30 PM C730624 — Plaintiff Counsel Frank Frisenda, Jr. (X)

V. GEORGES HUFNAGEL, M.D.
VS.
STATE OF CALIFORNIA, ET AL. — Defendant Counsel GLORIA BARRIOS(x)

NATURE OF PROCEEDINGS:

ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION HEARING AS DIRECTED BY DISTRICT COURT OF APPEAL;

C/F 5/10/96 PER STIP. & ORDER FILED 5/8/96;

C/F 6/5/96 ON COURT'S OWN MOTION;

Petition for Writ of Mandate is denied.

///

Finding IV: Weight of evidence supports finding. Petitioner unnecessarily sutured uterus after surgery when patient was healing and not bleeding.

Finding VII; Weight of evidence supports finding. Uterine suspension was not indicated because of degree of inflammation.

Finding XIII. Weight of evidence supports finding. The second surgery unnecessarily exposed the patient to risk.

Finding XLVII: Weight of evidence supports finding. Petitioner unnecessarily opened patients abdomen by ignoring fact that patient's low heart rate was not different from her heart rate before surgery.

The Board's decision is supported by the totality of the findings that are supported by the weight of the evidence.

MINUTES ENTERED
06/07/96
COUNTY CLERK

Page 1 of ___ DEPT. 69

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 06/07/96 DEPT. 69

HON. DAVID YAFFE, JUDGE — C. HUDSON DEPUTY CLERK
A. HARRIS, CRT.ASST.

HON. JUDGE PRO TEM 5. — NONE ELECTRONIC RECORDING MONITOR

A. AYALA, CSL DEPUTY SHERIFF — D. CASE REPORTER

1:30 PM C730624

Plaintiff Counsel Frank Frisenda, Jr. (X)

V. GEORGES HUFNAGEL, M.D.
VS.
STATE OF CALIFORNIA, ET AL.

Defendant Counsel GLORIA BARRIOS(x)

NATURE OF PROCEEDINGS:

The penalty of revocation is appropriate under the totality of the circumstances shown by the evidence.

Respondent to prepare proposed judgment, lodge after serving copy on Petitioner.

///

Court will hold for 10 days.

MINUTES ENTERED
06/07/96
COUNTY CLERK

F I L E D
LOS ANGELES SUPERIOR COURT

JUL 23 1996

JOHN A. CLARKE, CLERK

BY C.L.HUDSON, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

VICKI GEORGES HUFNAGEL, M.D. Petitioner, v. THE MEDICAL BOARD OF CALIFORNIA, et al Respondents.	CASE NO. C 730624 STATEMENT OF DECISION (Code of Civ. Proc. § 632.) Dept. 69 Judge: Hon. David Yaffe

This matter came regularly before this court on June 7, 1996, for hearing. Frank Frisenda, Jr. appeared as attorney for Petitioner. Daniel E. Lungren, Attorney General of the State of California, by and through Gloria A. Barrios, Deputy Attorney General appeared as attorney for Respondents. The matter was argued and submitted.

~~As stated during the hearing on this matter, this court has reviewed and considered the entire file, including the~~

~~complete administrative record.~~ Initialed by JUDGE YAFFE

As directed by the District Court of Appeal, the matter involved two separate issues. First, was the Medical Board of California's (hereinafter "the Board['s]") findings numbered IV, VII, XIII and XLVII supported by the weight of the evidence? Second, was the Board's decision supported by the totality of the findings?

The Court, in exercising its independent judgment, determines that the weight of the evidence supports the Board's finding number IV. The Court finds substantial evidence that Petitioner unnecessarily sutured patient Marsha C.'s uterus after surgery when the patient was healing and not bleeding.

The Court, in exercising its independent judgment, determines that the weight of the evidence supports the Board's finding number VII. The Court finds substantial evidence that Petitioner's performance of a uterine suspension on patient Marsha C. was not indicated because of the degree of inflammation.

The Court, in exercising its independent judgment, determines that the weight of the evidence supports the Board's finding number XIII. The Court finds substantial evidence that Petitioner unnecessarily exposed patient Karen G. to risk.

The Board's findings are therefore

sufficient under the standard set out in Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506.

The Court, in exercising its independent judgment, determines that the penalty of revocation is appropriate under the totality of the circumstances shown by the evidence. The Court denies Petitioner's request for a stay. The Petition for Writ of Mandate is denied.

Dated: JULY 19, 1996

s/David Yaffe
Judge of the Superior Court

F I L E D
LOS ANGELES SUPERIOR COURT

SEPT 02 1996

JOHN A. CLARKE, CLERK

BY C.L.HUDSON, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

VICKI GEORGES HUFNAGEL, M.D. Petitioner, v. THE MEDICAL BOARD OF CALIFORNIA, et al Respondents.	CASE NO. C 730624 JUDGMENT DENYING PETITION FOR WRIT OF MANDATE Dept. 69 Judge: Hon. David Yaffe

This matter came regularly before this court on June 7, 1996, for hearing. Frank Frisenda, Jr. appeared as attorney for Petitioner. Daniel E. Lungren, Attorney General of the State of California, by and through Gloria A. Barrios, Deputy Attorney General appeared as attorney for Respondents.

The Court having made a Statement of Decision, which has been signed and

filed, and the Court having reviewed and considered this entire matter,

IT IS ORDERED that:

1. The petition filed in this action for writ of mandate is denied.

2. The Petitioner's Request for a Stay is denied.

3. Parties to bear their own cost.

Dated: SEP 03 1996

s/David Yaffe
Judge of the Superior Court

C O P Y

ORIGINAL FILED
SEP 10, 1996
Civil Appeals
Room 111

Frank Frisenda, Jr. (Bar No. 85580)
Pattie L. Dyler (Bar No. 162682)
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Attorneys for Plaintiff and Appellant
Vicki George Hufnagel, M.D.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

VICKI GEORGES HUFNAGEL, M.D. Plaintiff and Appellant, vs. MEDICAL BOARD OF CALIFORNIA, et al. Defendant and Respondent.	Sup.Ct. No. C730624 NOTICE OF APPEAL [Code Civ. Proc. § 904.1] Judge: Hon. David Yaffe (RELATED TO NOTICE OF APPEAL FILED JULY 26, 1996)

FEE RECEIVED
CHECK# 9142

Plaintiff and Appellant Vicki George Hufnagel, M.D., appeals to the Court of Appeals of the State of California,

Second Appellate District, from the Judgment Denying Petition for Writ of Mandate filed and served by mail on September 3, 1996, (Exhibit "A") in Department 69 of the above-entitled court. This Notice of Appeal is related to Plaintiff's Notice of Appeal filed July 26, 1996 (Exhibit "B" hereto).

DATED: Sept. 10, 1996

FRISENDA, QUINTON & NICHOLSON

s/Frank Frisenda, Jr.
Counsel for Plaintiff and Appellant Vicki Georges Hufnagel

COURT OF APPEAL-SECOND DIST.
F I L E D
JUN 06 1997

JOSEPH A. LAKE_____CLERK

Z. HERALDEZ_____
DEPUTY CLERK

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA - SECOND APPELLATE DISTRICT
DIVISION FIVE

VICKI GEORGES HUFNAGEL,	B105213
Plaintiff and Appellant,	(Sup. Ct.No. C730624)
v.	DISMISSAL ORDER
MEDICAL BOARD OF CALIFORNIA, et al.	
Defendant and Respondent.	

The dismissal motion is granted. (Bus. & Prof. Code, § 2337; Tapia v. Superior Court (1991) 53 Cal.3d 282, 288-289; People v. Acosta (1996) 48 Cal.App. 4th 411, 415-420; Andrus v. Municipal Court (1983) 143 Cal.App.3d 1188, 1207, fn. 11.) The request to deem the appeal to be a mandate petition is denied. The petition does not involve unusual circumstances or an important issue of law with state-wide application. (Morehart v. County of Santa Barbara

(1994) 7 Cal.4th 725, 744-747; Olson v. Cory (1983) 35 Cal.3d 390, 401.) Nothing in this order should be construed to prohibit the filing of a mandate petition.

The appeal is dismissed. Each side shall bear its own costs on appeal.

s/Turner, P.J. Armstrong, J

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 69 HON. DAVID P. YAFFE, JUDGE

V. GEORGES HUFNAGEL, M.D.	)	
	)	
PETITIONER,	)	NO. C 730 624
	)	
VS.	)	
	)	
STATE OF CALIFORNIA, et al.,	)	
	)	
RESPONDENTS.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FRIDAY, JUNE 7, 1996

APPEARANCES:

FOR THE PETITIONER: FRISENDA,QUINTON & NICHOLSON
BY: FRANK FRISENDA, JR. ESQ.
11755 WILSHIRE BOULEVARD
TENTH FLOOR
LOS ANGELES, CALIF. 90025

FOR THE RESPONDENTS:

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
GLORIA BARRIOS, DEPUTY ATTORNEY GENERAL
300 SOUTH SPRING STREET
SUITE 500
LOS ANGELES, CALIF. 90013

C O P Y

DARYL C. CASE, CSR# 8739
OFFICIAL REPORTER

LOS ANGELES, CALIFORNIA; FRIDAY, JUNE 7, 1996; 2:04 P.M.

DEPARTMENT NO. 69 HON. DAVID P. YAFFE, JUDGE

APPEARANCES: (SEE TITLE PAGE.)

Pages 1, 2, and 3:

THE COURT: HUFNAGEL AGAINST THE STATE.

MR. FRISENDA: FRANK FRISENDA, YOUR HONOR, FOR THE PLAINTIFF.

MS. BARRIOS: GLORIA BARRIOS, FOR THE STATE OF CALIFORNIA.

MR. FRISENDA: ALSO WITH ME. IS DR. HUFNAGEL.

THE COURT: ALL RIGHT. THIS CASE IS HERE ON REMAND FROM THE COURT OF APPEAL. IT WAS REMANDED WITH SPECIFIC DIRECTIONS. THE DIRECTIONS ARE THAT I AM TO REVIEW AND EXERCISE MY INDEPENDENT JUDGMENT AS TO WHETHER FOUR OF THE BOARD'S FINDINGS ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE, AND, HAVING DONE THAT, TO REDETERMINE WHETHER THE BOARD'S DECISION IS SUPPORTED BY THE TOTALITY OF THE FINDINGS FOUND TO BE APPROPRIATELY SUPPORTED.

I HAVE GONE THROUGH THAT EXERCISE, REVIEWING THE EVIDENCE IN THE TRANSCRIPT POINTED OUT TO ME BY THE PETITIONER, AND BY THE RESPONDENT IN ITS OPPOSITION TO

PETITIONER'S BRIEF, AND I HAVE DRAFTED A TENTATIVE RULING BASED UPON THAT REVIEW. SO WHAT I WANT TO HEAR IS YOUR ARGUMENT TO MY TENTATIVE RULING, MR. FRISENDA, AND WHY IT IS INCORRECT.

MR. FRISENDA: ALL RIGHT. YOUR HONOR, WE HAD RECEIVED ON JUNE 4TH, 1996, RESPONDENT'S NOTICE OF LODGING OF ADMINISTRATIVE RECORD. THAT APPARENTLY WAS JUST LODGED BY RESPONDENT WITH THE COURT. I UNDERSTAND THAT RESPONDENT HAS ALSO FILED WITH THE COURT VARIOUS EXCERPTS, WHICH I HAVE NOT RECEIVED.

THE COURT: WELL, THE RESPONDENT HAS CERTAINLY BEEN DELINQUENT IN ASSISTING THE COURT. THE RESPONDENT HAS FILED SOMETHING CALLED DECLARATION OF GLORIA A. BARRIOS IN SUPPORT OF RESPONDENT'S OPPOSITION TO PETITIONER'S BRIEF. IT WAS FILED YESTERDAY AFTER I HAD WORKED THE MATTER UP AND FORMULATED THE TENTATIVE, SO IT WAS OF COURSE NO USE AT ALL TO ME IN DOING THAT, AND I HAVE NOT READ OR CONSIDERED THIS MOUNTAIN OF PAPER THAT WAS GIVEN TO THE COURT YESTERDAY.

WHAT I DID HAVE TO DO IS I HAD THE TRANSCRIPT OF PROCEEDINGS VOLUME 10, WHICH WAS THE TESTIMONY OF DR. PARKS, AND VOLUME 12, CONTAINING THE TESTIMONY OF DR. MASON THAT WAS REFERRED TO BY THE RESPONDENT IN ITS OPPOSITION BRIEF, AND I REVIEWED THE TESTIMONY IN THOSE TRANSCRIPTS.

MR. FRISENDA: ALL RIGHT. OTHER THAN THE TESTIMONY OF DR. PARKS AND DR. MASON, HAS THE COURT HAD AN OPPORTUNITY

TO REVIEW ANYTHING ELSE THAT WAS SUBMITTED BY RESPONDENT?

THE COURT: I REVIEWED THE EVIDENCE POINTED OUT BY THE PETITIONER IN THE PETITIONER'S BRIEF.

MR. FRISENDA: ALL RIGHT. AND WE HAD CONCURRENTLY WITH FILING OUR BRIEF ALSO FILED A REQUEST FOR JUDICIAL NOTICE OF THE BRIEF THAT WAS SUBMITTED AT THE ADMINISTRATIVE LEVEL REQUESTING RECONSIDERATION AS WELL AS HAVING SUBMITTED TO THIS COURT A COPY OF THE TRANSCRIPT FROM THE PRIOR LIMITED TRIAL DE NOVO. THAT WAS SUBMITTED TO THE COURT ON APRIL 15TH, 1996. HAS THAT REQUEST FOR JUDICIAL NOTICE BEEN TAKEN OR GRANTED BY THIS COURT?

THE COURT: I DO HAVE, YES, YOUR REQUEST TO TAKE JUDICIAL NOTICE.

MR. FRISENDA: AND IS THAT REQUEST FOR JUDICIAL NOTICE GRANTED BY THE COURT AS TO THE TWO DOCUMENTS ATTACHED, ONE BEING THE PRIOR MOTION FOR RECONSIDERATION AT THE ADMINISTRATIVE LEVEL OR PETITION FOR RECONSIDERATION, AND SECOND ONE THE COURT'S PRIOR TRANSCRIPT?

THE COURT: I HAVE REVIEWED THE PRIOR TRANSCRIPT OF THE PROCEEDINGS IN THIS COURT. I HAVE NOT REVIEWED THIS PETITION FOR RECONSIDERATION BECAUSE I DID NOT THINK THAT THAT WAS WHAT I WAS DIRECTED TO DO BY THE COURT OF APPEAL.

MR. FRISENDA: ALL RIGHT. IS THE COURT, THEN, PREPARED TO TAKE JUDICIAL NOTICE OF THE PETITION FOR RECONSIDERATION?

THE COURT: FOR WHAT PURPOSE?

MR. FRISENDA: FOR PURPOSES OF THE RECORD, THAT IS, THE EXERCISE OF THIS COURT'S INDEPENDENT JUDGMENT, HAS THE COURT CONSIDERED OR WILL THE COURT CONSIDER --

THE COURT: FOR WHAT PURPOSES?

MR. FRISENDA: FOR PURPOSES OF THIS COURT'S EXERCISE OF INDEPENDENT JUDGMENT AS DIRECTED BY THE COURT OF APPEALS.

THE COURT: WHAT DOES THE CONTENT OF A PETITION FOR RECONSIDERATION HAVE TO DO WITH THE EXERCISE OF MY INDEPENDENT JUDGMENT? YOU WANT ME TO RECONSIDER THE ARGUMENTS MADE IN THIS PETITION?

MR. FRISENDA: JUST SIMPLY THAT THIS IS PART OF THE ADMINISTRATIVE RECORD UPON WHICH THE MEDICAL BOARD BASED ITS DECISION.

THE COURT: I'M WILLING TO TAKE JUDICIAL NOTICE THAT THIS PETITION WAS FILED.

MR. FRISENDA: ALL RIGHT. SO WITH THAT SAID, THEN, I'M CLEAR THAT THE RECORD INCLUDES ALL OF THE EXHIBITS THAT WAS LODGED OR ADMITTED AT THE ADMINISTRATIVE LEVEL, AND IT INCLUDES THE BRIEFS OF THE VARIOUS PARTIES AT THIS

LEVEL. IT ALSO INCLUDES, THEN, THE PETITION FOR RECONSIDERATION SUBMITTED AT THE ADMINISTRATIVE LEVEL, AS WELL AS THE TRANSCRIPT FROM THE PRIOR HEARING, JUST SO THAT WE HAVE A CLEAR RECORD OF WHAT IS CONTAINED IN THIS COURT'S RECORD?

THE COURT: WELL, I DON'T KNOWN WHAT YOU ARE TRYING TO GET AT, MR. FRISENDA. WHAT I DID WAS I REVIEWED THOSE PORTIONS OF THE TRANSCRIPT OF THE ADMINISTRATIVE HEARING THAT WERE ALLUDED TO BY YOU IN YOUR BRIEF AS BEARING UPON THE FOUR ISSUES THAT I AM TO RECONSIDER HERE.

MR. FRISENDA: ALL RIGHT. AND THE COURT STILL IS NOT INCLINED, THEN TO GRANT THE REQUEST FOR JUDICIAL NOTICE AS TO THE MATTERS THAT WERE PREVIOUSLY HEARD BY THE COURT, IN PARTICULAR THE JUDGMENT THAT WAS RENDERED BY THE L.A. SUPERIOR COURT IN THE CASE OF JAN LEDOW, THE JUDGMENT THAT WAS RENDERED BY THE L.A. SUPERIOR COURT IN THE CASE OF RAMA HAGGARTY, AND THE TRANSCRIPT THAT WAS ALSO SUBMITTED PREVIOUSLY?

THE COURT MAY RECALL THAT PRIOR TO THIS HEARING THE COURT HAD CONSIDERED PETITIONER'S REQUEST TO TAKE JUDICIAL NOTICE OF THOSE MATTERS, AND THE COURT HAD DENIED PETITIONER'S REQUEST TO TAKE JUDICIAL NOTICE OF THOSE MATTERS AS, I BELIEVE THE COURT STATED, IT WAS OUTSIDE OF WHAT THE COURT BELIEVED THE COURT OF APPEALS MANDATE WAS OR REMAND WAS.

THE COURT: WELL, I THINK THE COURT OF APPEAL WAS CLEAR IN WHAT IT DIRECTED ME TO DO, AND I THINK I HAVE DONE WHAT

THE COURT OF APPEAL DIRECTED ME TO DO. IF YOU DON'T THINK THAT I HAVE DONE WHAT THE COURT OF APPEAL DIRECTED ME TO DO, THEN I'M INTERESTED IN HEARING WHAT YOUR ARGUMENT IS AS TO WHAT ELSE I AM SUPPOSED TO HAVE DONE. I THINK I'VE ADEQUATELY DESCRIBED WHAT I DID.

MR. FRISENDA: ALL RIGHT. THEN BASED ON THIS COURT'S EARLIER RULING -- THIS WAS ON MARCH 29, 1996 -- ON THAT DATE THIS COURT DENIED PETITIONER'S REQUEST TO TAKE JUDICIAL NOTICE OF VARIOUS DECISIONS OF THE L.A. SUPERIOR COURT IN MATTERS CONCERNING PETITIONER, THAT IS, DR. HUFANGEL. I HAVE A TRANSCRIPT OF THAT PROCEEDING, BUT JUST TO CLARIFY THE RECORD HERE, THIS COURT WOULD NOT TAKE JUDICIAL NOTICE OF THE DETERMINATIONS THAT WERE MADE BY THE L.A. SUPERIOR COURT IN THE CASE OF JAN LEDOW VERSUS DR. HUFNAGEL AS WELL AS IN THE CASE OF RAMA HAGGARTY.

THE COURT: WHAT THE COURT DID ON MARCH 29TH IS REFLECTED IN THE COURT'S MINUTE ORDER OF MARCH 29. I DO NOT PROPOSE TO REVISIT THAT.

MR. FRISENDA: ALL RIGHT. WITH REGARD TO THIS MATTER, THEN, I BELIEVE ONE OF THE CENTRAL ISSUES ADDRESSED BY PETITIONER'S BRIEF, THAT IS, THE BRIEF LEADING TO THIS HEARING, WAS THE FACT THAT THE MEDICAL BOARD ITSELF DID NOT SEE AND DID NOT HEAR LIVE TESTIMONY FROM ANY OF THE WITNESSES. THAT INCLUDES DR. HUMMER, DR. QUEVEDO, AS WELL AS PETITIONER HERSELF. CERTAIN ASPECTS OF THE MEDICAL BOARD'S DECISION IS BASED ON

CREDIBILITY OF THOSE WITNESSES AS WELL AS DR. HUFNAGEL, AND FROM THAT STANDPOINT THE BASIS, I BELIEVE, IN PART OF PETITIONER'S ATTACK ON WHAT THE MEDICAL BOARD DID IS, THE MEDICAL BOARD HAVING NO ADVANTAGE, THAT IS, NOT SEEING LIVE ANY OF THE PERCIPIENT WITNESS, COULD NOT BASE ITS FINDINGS OR DETERMINATION ON THE CREDIBILITY OF THESE WITNESSES.

THE COURT: DID YOU MAKE THAT ARGUMENT TO THE COURT OF APPEAL, MR. FRISENDA?

MR. FRISENDA: WE DID NOT, AND THAT IS BECAUSE THE COURT OF APPEALS FOUND THAT THE JUDGE'S RULING, JUDGE NEHER, SERVED NO FUNCTION IN THE EXERCISE OF THIS COURT'S INDEPENDENT JUDGMENT.

THE COURT: WHY DIDN'T YOU TELL THE COURT OF APPEAL THAT THE TRIAL COURT WAS CORRECT IN SENDING IT BACK TO THE MEDICAL BOARD SO THAT IT COULD HAVE THE BENEFIT OF ALL OF THIS EVIDENCE THAT YOU NOW SAY I SHOULD CONSIDER?

MR. FRISENDA: WELL, YOUR HONOR, I BELIEVE THAT WHAT THE COURT OF APPEALS DID, AND WHAT IT DID IN ITS DECISION WHOLEHEARTEDLY, IS TO REVERSE THE TRIAL COURT'S ORIGINAL DETERMINATION ON THIS MATTER OF LIMITED TRIAL DE NOVO. THEY DID SO ON THE BASIS THAT THIS COURT USED THE STANDARD, WHICH THE COURT OF APPEALS SAID WAS IMPROPER, OR REFERRING BACK TO THE ADMINISTRATIVE LAW JUDGE'S DECISION, THAT IS, IN THE CASE OF -- IN THIS COURT'S DECISION IN MAY OF 1990.

THIS COURT FOUND THAT CERTAIN FINDINGS WERE CONCLUSIONARY WITH REGARD TO THE MEDICAL BOARD. IT DID SO IN PART BY COMPARING WHAT THE ADMINISTRATIVE LAW JUDGE HAD FOUND, WHO WAS THE TRIER OF FACT, HAD SEEN THE WITNESSES LIVE, AND, COMPARING THAT PROPOSED ADMINISTRATIVE DECISION UP AGAINST WHAT THE MEDICAL BOARD EVENTUALLY DID, THE COURT OF APPEAL SAID, BASED ON THE FACT THAT THE ADMINISTRATIVE LAW JUDGE'S DECISION WAS NOT ADOPTED AND IT WAS ONLY A PROPOSED DECISION, IT SERVED NO FUNCTION IN THIS COURT'S REVIEW AND IN ITS EXERCISE OF THE INDEPENDENT JUDGMENT THAT THE COURT IS REQUIRED TO MAKE.

WHEN IT DID THAT, THAT IS, WHEN THE COURT OF APPEALS PRONOUNCED THAT THE ADMINISTRATIVE LAW JUDGE'S DECISION SERVED NO FUNCTION IN THIS PROCESS, IT ALSO IN PETITIONER'S FAVOR REMOVES AS A BASIS FOR SUPPORT ANY FINDING OF CREDIBILITY OF THE WITNESSES OR LACK THEREOF. THAT'S SOMETHING SEPARATE THAN THE COURT OF APPEALS SAYING THE PROPER STANDARD IS TO LOOK AT THE RECORD ITSELF VERSUS LOOKING AT WHAT THE PROPOSED DECISION WAS UNDER THE ADMINISTRATIVE LAW JUDGE.

FROM A PROCEDURAL STANDPOINT AND AN EVIDENTIARY STANDPOINT AND SOMETHING THAT WE BELIEVE WOULD BE VERY IMPORTANT, IF THAT ADMINISTRATIVE LAW JUDGE'S DECISION SERVES NO PURPOSE, AS THE COURT OF APPEAL SAYS, THEN IT CANNOT BE USED AS A FACTOR IN ASSESSING THE WITNESS' CREDIBILITY, WHETHER THAT BE A PETITIONER, WHETHER IT BE A PETITIONER'S

EXPERTS OR WHETHER IT BE A RESPONDENT'S EXPERTS.

THE MEDICAL BOARD, NOT HAVING HEARD ANY OF THESE WITNESSES, NOT SEEING ANY OF THEIR DEMEANOR, NOT SEEING ALL THE REQUIREMENTS AS LAID OUT IN THE EVIDENCE CODE FOR ASSESSMENT OR CREDIBILITY, COULD NOT USE CREDIBILITY AS A FACTOR IN DETERMINING TO SLIDE WITH ONE SIDE OR ANOTHER. THIS COURT IN ITS EXERCISE OF INDEPENDENT JUDGMENT HAS TO DETERMINE WHETHER THE ADMINISTRATIVE RECORD SUPPORTS THE WEIGHT, THAT IS, WHETHER THIS IS A CASE WHERE THE ADMINISTRATIVE RECORD WILL SUPPORT THEIR FINDINGS BY -- AND THE STANDARD OF THE ADMINISTRATIVE LEVEL IS -- BY CLEAR AND CONVINCING EVIDENCE WITH REASONABLE CERTAINTY.

IF WE REMOVE CREDIBILITY AS A FACTOR -- AND IT'S CONTAINED IN THE MEDICAL BOARD'S DECISION ITSELF -- IF THAT FACTOR IS IMPROPERLY INCLUDED BY THE MEDICAL BOARD BECAUSE, UNDER VOLLSTEDT AND UNDER THE OTHER CASES, THEY HAD NOT SEEN ANY OF THESE WITNESSES LIVE, WE BELIEVE THAT THE RECORD AT THE ADMINISTRATIVE LEVEL AND THE RECORD OF THIS COURT SIMPLY SHOWS THAT REASONABLE PHYSICIANS CAN DIFFER AS TO WHAT IS A CORRECT PROCEDURE AND WHAT IS NOT A CORRECT PROCEDURE UNDER THE CIRCUMSTANCES OF EACH OF THE PATIENTS INVOLVED IN THIS ACCUSATION.

THAT CRITICAL ISSUE OF CREDIBILITY, WE BELIEVE, COULD NOT BE FOR THE MEDICAL BOARD TO INCLUDE IN ITS DECISION BECAUSE IT WAS NOT THERE. IT

DID NOT HEAR. IT DID NOT VIEW. FROM THAT STANDPOINT, WE BELIEVE THAT THE RECORD SIMPLY DEMONSTRATES A CASE WHERE THE EVIDENCE CAN BE INTERPRETED EITHER WAY. PETITIONER HAD HER EXPERTS TESTIFY -- THAT IS, DR. HUMMER, DR. QUEVEDO -- IN ADDITION TO OTHER WITNESSES, AND THAT INFORMATION IS EXCERPTED ON THE PART OF PETITIONER TO SUPPORT HER POSITION. AND IF THE COURT WOULD LIKE I CAN GO THROUGH SPECIFICALLY EACH ONE OF THE PATIENTS INVOLVED IN THE ACCUSATION, JUST TO DEMONSTRATE TO THIS COURT THAT THERE IS EVIDENCE ON BOTH SIDES OF THE ISSUES.

THE COURT: THERE'S NO QUESTION ABOUT THAT. IT'S NOT NECESSARY FOR YOU TO REVIEW IT. I REVIEWED THE EVIDENCE THAT YOU ALLUDED TO IN YOUR BRIEF THAT SUPPORTS YOUR POSITION, THE TESTIMONY OF DR. QUEVEDO AND DR. HUMMER.

MR. FRISENDA: AND SOME OF THE OTHERS, YEAH.

WHEN THIS COURT, THOUGH, USED THAT EVIDENCE, DOES THIS COURT TAKE INTO ACCOUNT ANY CREDIBILITY ASSESSMENT?

THE COURT: GO AHEAD AND MAKE YOUR ARGUMENT. I'M A LITTLE BIT AT A LOSS TO -- WELL, I'M JUST WONDERING HOW YOU GET TO THE FACT OF -- HOW YOU EQUATE THE FACT OF ASSESSING CREDIBILITY WITH SEEING THE LIVE WITNESSES TESTIFY. IS IT YOUR POSITION THAT THE ASSESSMENT OF CREDIBILITY CANNOT BE DONE WITHOUT THE BASIS OF THE RECORD AND SEEING THE WITNESS TESTIFY?

MR. FRISENDA: YES, IT IS.

THE COURT: AND YOU DID NOT MAKE THAT ARGUMENT TO THE COURT OF APPEAL?

MR. FRISENDA: THAT WAS NOT AN ARGUMENT AT THE COURT OF APPEAL. THE ARGUMENT AT THE COURT OF APPEAL LEVEL WAS SOMETHING COMPLETELY DIFFERENT THAT WHAT IS THE ISSUE NOW.

THE COURT OF APPEALS SENT THE CASE BACK ON REMAND BECAUSE, AGAIN, IN THE COURT OF APPEAL'S VIEW, THIS COURT USED THE WRONG STANDARD. IT SIMPLY TOOK INTO ACCOUNT WHAT WAS CONTAINED IN THE ADMINISTRATIVE --

THE COURT: WHY DID THE APPELLATE COURT GIVE ME THE DIRECTIONS IT GAVE ME?

MR. FRISENDA: WELL, THEY GAVE YOU THE DIRECTIONS, BUT THE DIRECTIONS WERE VERY CLEAR IN SOME AREAS. THE DIRECTIONS WERE FOR THIS COURT VERY DEFINITELY TO EXERCISE ITS INDEPENDENT JUDGMENT, IT'S UNFETTERED JUDGMENT BASED ON NOT ONLY THE RECORD AT THE ADMINISTRATIVE LEVEL BUT ANYTHING ELSE THAT THIS COURT FEELS IS NECESSARY TO EXERCISE ITS INDEPENDENT JUDGMENT. THAT'S THE TEST BECAUSE WE'RE DEALING WITH A FUNDAMENTAL RIGHT HERE IN TERMS OF A PHYSICIAN'S LICENSE, AND WE'RE DEALING WITH THE ULTIMATE PENALTY OF REVOCATION.

THE COURT: SO WHAT'S YOUR POINT? WHAT IS IT THAT YOU CONTEND, THEN, THAT THIS COURT SHOULD DO?

MR. FRISENDA: WHAT THIS COURT SHOULD DO IS REEVALUATE, THAT IS, TO EXERCISE ITS INDEPENDENT JUDGMENT AS TO HOW FINDINGS THAT ARE APPROPRIATELY SUPPORTED -- IN OTHER WORDS, WHAT THIS COURT SHOULD DO IS TO CONDUCT A WEIGHING TEST TO SEE WHETHER THE WEIGHT OF THE EVIDENCE SUPPORTS WHAT THE MEDICAL BOARD'S DECISION IS.

AND THE COURT OF APPEALS CITES KEARL V. MEDICAL BOARD, AND DOES SO VERY --

THE COURT: AND YOUR CONTENTION, MR. FRISENDA, AS TO THE PROCEDURE THAT I'M SUPPOSED TO DO TO DO THAT IS WHAT?

MR. FRISENDA: THE PROCEDURE IS TO -- THIS IS FOUND ON PAGE 8 OF RESPONDENT'S OPENING BRIEF, BUT I'LL JUST READ IT FOR THE RECORD:

> "THE TRIAL COURT'S REVIEW OF THE EVIDENCE IN SUCH A CASE AS THIS WHERE A FUNDAMENTAL VESTED RIGHT IS AT ISSUE IS AN INDEPENDENT REVIEW OF THE EVIDENCE."

AND THAT'S KEARL V. MEDICAL BOARD. THE CITE ON THAT IS 189 CAL.APP.3D 1040. AND KEARL IS SPECIFICALLY MENTIONED BY THE COURT OF APPEALS, THAT IS, THE COURT OF APPEALS IN ITS DECISION. I'M READING FROM PAGE 19 OF THE COURT OF APPEALS DECISION.

> "ALTHOUGH FINDINGS MAY BE SUPPLEMENTED BY REFERENCE TO

THE ADMINISTRATIVE RECORD ITSELF, (KATEEN V. DEPARTMENT OF REAL ESTATE, IT IS NOT NECESSARILY FOR THEM TO BE SO SUPPLEMENTED. THE TRIAL COURT'S REVIEW OF THE EVIDENCE IN A CASE SUCH AS THIS WHERE A FUNDAMENTAL VESTED RIGHT IS AT ISSUE IS AN INDEPENDENT REVIEW OF THE EVIDENCE."

IT SAYS:

"THUS, THE TRIAL COURT IS NOT, IN ITS REVIEW OF THE EVIDENCE, RESTRICTED TO THE EVIDENCE RELIED UPON BY THE BOARD, BUT MUST INSTEAD REVIEW THE ENTIRE RECORD TO DETERMINE IF THE WEIGHT OF THE EVIDENCE SUPPORTS THE BOARD'S FINDING."

THIS IS DIRECTLY QUOTING FROM THE COURT OF APPEALS DECISION. WHAT THE COURT OF APPEALS IS SAYING IN ITS REMAND IS, DON'T LOOK AT THE PROPOSED ADMINISTRATIVE DECISION OF JUDGE NEHER -- THAT IS THE JUDGE WHO HAD HEARD THE LIVE TESTIMONY. THE COURT OF APPEAL SAYS THAT VERY CLEARLY, THAT IT SERVES NO FUNCTION IN THIS COURT'S INDEPENDENT REVIEW. ESSENTIALLY WHAT THE COURT OF APPEALS AND THE CASE LAW SAYS IS, ONCE THAT HAPPENS, THAT IS, ONCE THE BOARD VOTES NOT TO ADOPT THE ADMINISTRATIVE LAW JUDGE'S DECISION, THEN IT IS A NULLITY. AS A MATTER OF FACT, THE COURT OF APPEAL SAYS THAT SPECIFICALLY.

THAT BECOMES IMPORTANT FOR

SEVERAL REASONS, BECAUSE IF THE --

THE COURT: I DON'T THINK IT'S NECESSARY TO ARGUE THAT BECAUSE I DID NOT REVIEW THAT DECISION.

MR. FRISENDA: UNDERSTOOD.

THE COURT: WHAT I REVIEWED WAS THAT PORTION OF THE ADMINISTRATIVE RECORD THAT YOU POINTED ME TO IN YOUR BRIEF.

MR. FRISENDA: VERY TRUE.

THE COURT: IS THERE SOMETHING ELSE THAT I WAS SUPPOSED TO REVIEW?

MR. FRISENDA: NO, JUST TO LOOK AT IT FROM A STANDPOINT OF IF THAT ADMINISTRATIVE LAW JUDGE'S DECISION IS A NULLITY, AS THE COURT OF APPEALS SAYS IT IS, THEN CREDIBILITY CANNOT BE USED AS A FACTOR BY THE MEDICAL BOARD UNLESS THE MEDICAL BOARD HAD SEEN THE WITNESSES ITSELF LIVE.

THE COURT: WHAT IS THAT?

MR. FRISENDA: WELL, FOR THE REASON THAT THE EVIDENCE CODE DEFINES WHAT ARE THE FACTORS TO BE CONSIDERED BY THE TRIER OF FACT AND CREDIBILITY, AND THEY ARE ALL THE NORMAL THINGS THAT A TRIER OF FACT WOULD EXPECT TO PERCEIVE FIRSTHAND, LIVE, WHICH IS THE WITNESS' DEMEANOR, HOW THE WITNESS TESTIFIES, WHAT THE WITNESS TESTIFIES TO, ET CETERA.

THE COURT: ALL RIGHT. SO YOUR POINT, IF I UNDERSTAND YOU CORRECTLY, IS

THAT SINCE THE MEDICAL BOARD DID NOT HAVE THE LIVE WITNESSES BEFORE IT, THE ONLY THING THE MEDICAL BOARD WAS ENTITLED TO DO WAS TO SAY THAT REASONABLE MINDS COULD DIFFER ON THIS QUESTION.

MR. FRISENDA: THAT'S CORRECT, BECAUSE IT COULD NOT USE CREDIBILITY AS A FACTOR IN ENHANCING ONE POSITION OR ANOTHER, THAT IS, WHETHER IT WAS PETITIONER OR RESPONDENT.

THE COURT: BUT THAT'S NOT WHAT THE MEDICAL BOARD DID, IS IT?

MR. FRISENDA: YOUR HONOR, I BELIEVE THAT THE MEDICAL BOARD'S FINDING, THAT IS, THE ONES TO BE REVIEWED BY THE COURT, ARE REPLETE WITH INDICATIONS WHERE THE MEDICAL BOARD FINDS SOME WITNESSES MORE CREDIBLE THAN OTHERS, AND SPECIFICALLY DISCOUNTS THE WITNESS TESTIMONY THAT IS THE EXPERT WITNESS TESTIMONY OF PETITIONER ON THAT BASIS.

THE COURT: SO WHAT IS IT THAT YOU NOW CONTEND I SHOULD DO?

MR. FRISENDA: WELL, NUMBER ONE, TO ELIMINATE FROM THE BOARD'S DECISION ANY OF THE DECISIONS BASED UPON THE CREDIBILITY OF WITNESSES, BECAUSE THAT CAN'T OCCUR. THE MEDICAL BOARD COULD HAVE -- AND NOTHING PREVENTS THE MEDICAL BOARD FROM DOING THIS, FROM REHEARING THE MATTER WITH WITNESSES. IMAGINE IF THE COURT OF APPEALS WERE TO REVERSE THIS COURT OR ANY OTHER TRIER OF FACT AND SIMPLY SAY, TRIER OF FACT, YOU ARE INCORRECT. COURT OF APPEALS OR A

REVIEWING BODY WOULD NEVER DO THAT, AND IT COULDN'T DO THAT BECAUSE UNDER THE MANDATE OF VOLLSTEDT AND ALL THE OTHER CASES PRECEDING VOLLSTEDT -- AND WE'RE DEALING WITH U.S. SUPREME COURT PRECEDENT. HE WHO DECIDES MUST HEAR. IT'S A SIMPLE PRINCIPLE, BUT A VERY INGRAINED ONE IN BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS, AND I THINK THAT THIS COURT --

THE COURT: SOUNDS LIKE THE ARGUMENT YOU SOLD ME ON LAST TIME, THAT WAS REVERSED BY THE COURT OF APPEAL, MR. FRISENDA. IF IT'S NOT THAT, IT SOUNDS PRETTY CLOSE TO IT.

MR. FRISENDA: YOUR HONOR, IT IS NOT THE SAME ARGUMENT, AND LET ME AGAIN REPEAT IT SO THAT WE'RE CLEAR ON IT. WHAT THE COURT OF APPEALS SAID IS THIS TRIAL COURT USED THE WRONG STANDARD BECAUSE IT SHOULD NOT HAVE CONSIDERED THE ADMINISTRATIVE LAW JUDGE'S DECISION WHEN IT COMPARED WHAT THE MEDICAL BOARD DID. I MEAN, LOOK, THE REALITY OF THE SITUATION IS, THE ADMINISTRATIVE LAW JUDGE FOUND ONE THING, RECOMMENDED PROBATION, AND THE MEDICAL BOARD IN ITS INFINITE WISDOM REVERSED THE ADMINISTRATIVE LAW JUDGE, ALTHOUGH IT INITIALLY REPEATED VERBATIM THE FINDINGS OF THE ADMINISTRATIVE LAW JUDGE. SOUNDS GOOD ON PAPER. IT SOUNDS GOOD ON PAPER THAT WE SIMPLY CHANGE THE RESULT, USE THE SAME DETAILED FINDINGS THAT THE ADMINISTRATIVE LAW JUDGE FOUND, AND JUST SIMPLY SCRAP THEM AND SAY, I'M GOING TO CHANGE THE RESULTS IN THE CASE. THAT, THE MEDICAL BOARD COULD NOT DO.

THIS COURT USED, I THINK, A RATIONAL BASIS OR FEELING IN SAYING, "HOW CAN YOU DO THAT, MEDICAL BOARD? YOU MUST HAVE DONE SOMETHING DIFFERENT. YOU MUST HAVE HAD SOME ADDITIONAL EXPERTISE THAT YOU ARE RELYING ON, BECAUSE HOW CAN TWO ENTITIES HEAR THE SAME INFORMATION PURPORTEDLY OR REVIEW THE SAME RECORD PURPORTEDLY AND COME UP WITH THE DRASTICALLY DIFFERENT RESULTS?"

ALL THE COURT OF APPEALS IS SAYING, THEN, IN THAT RESPECT IS, "TRIAL COURT, YOU MAY HAVE A CORRECT GUT FEEL, BUT YOU CAN'T DO IT ON THE BASIS OF COMPARING THE ADMINISTRATIVE LAW JUDGE'S DECISION WITH WHAT THE MEDICAL BOARD ULTIMATELY DID AND THEY SAID."

AND IT IS INGRAINED IN THE CASE LAW, LIKE IT OR NOT, THAT ONCE THE VOTE IS MADE BY THE MEDICAL BOARD, THAT ADMINISTRATIVE LAW JUDGE'S DECISION SERVES NO LEGAL FUNCTION. IT'S A NULLITY. IT'S VOID. THAT'S WHAT THE COURT OF APPEALS ITSELF SAYS. SO THAT CUTS BOTH WAYS. WHILE THE COURT OF APPEALS UNDERCUTS THE BASIS FOR THIS COURT'S PRIOR DECISION AND SAYS, YOU CAN'T LOOK AT THE ADMINISTRATIVE LAW JUDGE'S DECISION IN GRANTING A WRIT, IT CUTS AGAINST THE MEDICAL BOARD IN THIS INSTANCE WHERE THE MEDICAL BOARD SEEKS TO RUBBER STAMP CERTAIN OF THE FINDINGS OF THE ADMINISTRATIVE LAW JUDGE ON THE ISSUE OF CREDIBILITY, AND IT CAN'T DO THAT EITHER. IF IT'S A NULLITY, IT'S A NULLITY FOR BOTH SIDES. IT'S NOT JUST A NULLITY FOR PETITIONER. IT'S A NULLITY ALSO FOR THE MEDICAL BOARD.

AND NOT HAVING THE BENEFIT OF LIVE WITNESSES, AND TO SEE THEIR DEMEANOR AND ALL THE REQUIREMENTS BUILT INTO THE EVIDENCE CODE OF WHAT ASSESSES CREDIBILITY, THEY CAN'T USE CREDIBILITY AS A BASIS TO SUPPORT THEIR FINDINGS. THAT'S, I BELIEVE, IMPORTANT BECAUSE IF THAT FACTOR IS REMOVED, THEN WHAT WE BATTLE OR WHAT WE WIND UP WITH IS TESTIMONY THAT SUPPORTS EACH SIDE OF THE CASE: THE EXCERPTS THAT WE CITED TO SUPPORT THE FACT THAT PETITIONER'S STANDARD OF MEDICAL CARE WAS WITHIN THAT OF THE COMMUNITY. THE FACT THAT THE MEDICAL BOARD CITES CERTAIN TESTIMONY FROM THEIR EXPERTS, WELL, THAT SIMPLY SUPPORTS THEIR SIDE OF THE CASE, BUT THAT ISN'T THE STANDARD FOR CLEAR AND CONVINCING EVIDENCE, WHICH THE MEDICAL BOARD HAS TO USE WHEN IT MAKES THESE DETERMINATIONS.

INDEED, THE LAW ALLOWS THE MEDICAL BOARD TO SCRAP WHAT THE ADMINISTRATIVE LAW JUDGE DID IN TERMS OF ITS RESULTS, AND STILL RELY ON THE FINDINGS. THAT IS, THE GOVERNMENT CODE SECTION ALLOWS THE MEDICAL BOARD TO CHANGE WHAT THE ADMINISTRATIVE LAW JUDGE DOES NOT WHEN THEY SCRAP IS ENTIRELY, BUT THE GOVERNMENT CODE ALLOWS THE MEDICAL BOARD TO TAKE THE FINDINGS OF THE MEDICAL BOARD -- I'M SORRY -- THE FINDINGS OF THE ADMINISTRATIVE LAW JUDGE'S DECISION AND REDUCE THE PENALTY THAT THE ADMINISTRATIVE LAW JUDGE AWARDS.

THE COURT: BUT NOT INCREASE IT?

MR. FRISENDA: BUT NOT INCREASE IT.

AND THE REASON FOR THAT IS PREMISED ON THE SAME -- FOR THE SAME REASONS THAT I --

THE COURT: DID YOU MAKE THAT ARGUMENT TO THE COURT OF APPEAL?

MR. FRISENDA: WE DID NOT MAKE THAT ARGUMENT TO THE COURT OF APPEALS. WE DID MAKE AN ARGUMENT TO THE CALIFORNIA SUPREME COURT THAT TALKED ABOUT THIS PROVISION IN THE GOVERNMENT CODE, THAT IS, THE PROVISION IN THE GOVERNMENT CODE THAT ALLOWS THE MEDICAL BOARD TO ADOPT THE FINDINGS AND CHANGE THE RESULT TO LESSEN THE PENALTY, NOT TO ENHANCE IT.

THAT LOGIC AND THAT RATIONALE IS INGRAINED STILL IN -- IN THE PRINCIPLE OF VOLLSTEDT, AGAIN CITED BY THIS CALIFORNIA APPELLATE COURT, THAT SAYS HE WHO DECIDES MUST HEAR.

SO AT THE VERY LEAST THE DECISION, OR THE FINDINGS OF THE MEDICAL BOARD IN ITS DECISION CERTAINLY CANNOT BE PREMISED ON CREDIBILITY, AND THAT IS BECAUSE THE MEDICAL BOARD NEVER HEARD ONE WORD FROM A LIVE WITNESS.

THE COURT: ALL RIGHT.

MISS BARRIOS.

MS. BARRIOS: YOUR HONOR, THE MEDICAL BOARD ACTED PROPERLY, AND EVIDENCE OF THAT IS ON PAGE 6 OF THE COURT OF APPEAL DECISION WHERE THE COURT OF APPEAL GOES INTO THE CREDIBILITY ISSUE EVEN THOUGH IT WASN'T RAISED BY

PETITIONER, AND THAT IS, THEY GO THROUGH THE ADMINISTRATIVE LAW JUDGE, WHO SAYS WHY HE FOUND DR. HUFNAGEL LACKING IN CREDIBILITY. IT WASN'T JUST BASED ON DEMEANOR. IT WAS BASED ON RECORDS, PRIOR INCONSISTENT STATEMENTS, CONFLICTING ANSWERS TO THE SAME QUESTIONS, AND OUTRIGHT LACK OF FORTHRIGHTNESS.

THE BOARD THEN ADOPTED THOSE FINDINGS. THE COURT OF APPEAL DID NOT SAY THAT THERE'S ANY MISSTEP IN THAT ADOPTION, AND THAT RECORD, YOUR HONOR, IS FOR MR. FRISENDA THEN TO APPEAL TO YOU TO REVIEW THE ENTIRE RECORD AND SAY HERE IS HOW SHE WAS CONSISTENT. HERE IS HOW THE RECORDS ARE CONSISTENT WITH HER TREATMENT. AND THAT IS WHAT HE ATTEMPTED TO DO. AND NOW HE'S TRYING TO SAY THAT THE BOARD CAN'T DO THIS, YOU CAN'T DO IT, AND WE MUST REVISIT BACK TO THE ORIGINAL ADMINISTRATIVE LAW JUDGE DECISION.

AND THAT'S EXACTLY WHAT THE COURT OF APPEAL SAID YOU CANNOT DO. SO IT'S BASICALLY THE SAME ARGUMENT. HE JUST HAS A DIFFERENT DRESS ON IT.

MR. FRISENDA: YOUR HONOR, IF I MIGHT, THIS ISSUE IS A NEW ISSUE. IT'S BASED ON THE FACT THAT THE COURT OF APPEALS HAS SAID THAT THAT ADMINISTRATIVE LAW JUDGE'S DECISION SERVES NO FUNCTION IN THIS PROCESS. WHAT THIS COURT IS ABLE TO DO, AND WITHOUT FEAR OF THE CALIFORNIA APPELLATE COURT SAYING THAT IT HAS TO DO SOMETHING DIFFERENT, IS SIMPLY REMAND THIS CASE BACK DOWN TO THE MEDICAL BOARD AND MAKE THEM CLARIFY --

THE COURT: MR. FRISENDA, ISN'T THAT WHAT I DID THE LAST TIME THAT GOT ME REVERSED?

MR. FRISENDA: ONLY BECAUSE THIS COURT RELIED ON THE ADMINISTRATIVE LAW JUDGE'S DECISION. NOW WE HAVE A RECENT PRONOUNCEMENT FROM THE COURT OF APPEALS THAT SAYS THAT SERVES NO FUNCTION, AND WHETHER IT'S THE CALIFORNIA APPELLATE COURT, WHETHER IT'S THIS TRIAL COURT OR WHETHER IT'S THE MEDICAL BOARD IN REVIEW OF THAT ADMINISTRATIVE LAW JUDGE'S DECISION, IT'S A NULLITY. IT CAN'T RELY ON IT. IT CAN'T CHERRY-PICK OUT WHAT IT LIKES FROM THE ADMINISTRATIVE LAW JUDGE'S DECISION TO SUPPORT A DIFFERENT RESULT WHERE THE PENALTY IS ENHANCED, NOT REDUCED.

FROM THAT STANDPOINT, THIS COURT ALSO CAN CORRECTLY EXERCISE ITS DISCRETION AND SAY THAT IT FINDS THE PENALTY OF REVOCATION SIMPLY TO BE ARBITRARY AND CAPRICIOUS UNDER THE RECORD, REFER IT BACK TO THE MEDICAL BOARD AND HAVE IT REEVALUATE THAT PENALTY THAT'S IMPOSED. REVOCATION IS A DRASTIC AND SEVERE SANCTION, ONE THAT ADMINISTRATIVE LAW JUDGE DIDN'T FIND APPROPRIATE UNDER ALL OF THE PATIENTS COMBINED, ALL OF THE ACCUSATIONS COMBINED. IF THE ADMINISTRATIVE LAW JUDGE DIDN'T FIND REVOCATION TO BE APPROPRIATE UNDER THE TOTALITY OF THE ENTIRE RECORD, HOW CAN THIS MEDICAL BOARD NOW SIMPLY SCRAP WHAT THE ADMINISTRATIVE LAW JUDGE'S DECISION IS AND FIND THE PENALTY OF REVOCATION, THE MOST HARSH, SEVERE PENALTY, ON EACH OF THE PATIENTS

IN THE ACCUSATION?

THIS IS A CAPRICIOUS AND ARBITRARY RESULT, NOT BECAUSE CREDIBILITY IS SIMPLY RELIED UPON BY THE MEDICAL BOARD WHEN IT DIDN'T HEAR ANYTHING, BUT ALSO ON THE RECORD ITSELF. THERE IS NOT ONE INSTANCE HERE WHERE ANY OF THE PATIENTS HAD SUFFERED ANY DRASTIC INJURY. THERE IS NO DEATH OF ANY OF THESE PATIENTS. EVERY PATIENT RECEIVED THE MAXIMUM CARE THAT A PATIENT COULD RECEIVE, THERE MIGHT BE A DEBATE AS TO WHAT SHOULD BE APPROPRIATE, PARTICULARLY IN THE MID-EIGHTIES, AS TO WHETHER HYSTERECTOMIES SHOULD BE PERFORMED ROUTINELY OR A MORE CONSERVATIVE OR LESS INVASIVE SURGICAL APPROACH SHOULD BE ADOPTED.

NOW WE'RE TEN YEARS LATER. THE SAME THING HAPPENED IN THE AREA OF BREAST SURGERY, WHERE MASTECTOMIES USED TO BE THE ORDER OF THE DAY AND TODAY LUMPECTOMIES OR MYOMECTOMIES ARE THE RECOGNIZED TREATMENT. THIS WAS SIMPLY IN THE MID-EIGHTIES A BATTLE OF THE EXPERTS, A BATTLE OF DIFFERING OPINIONS OF OBGYN'S IN THE FIELD AS TO WHAT IS THE STANDARD OF CARE THAT'S APPROPRIATE.

THE RECORD SHOWS THAT NONE OF THESE PATIENTS SUFFERED ANY INJURY, NOT ONE OF THE PATIENTS DIED, NOT ONE OF THE PATIENTS WERE CLOSE TO DEATH OR NEAR DEATH OR HAD ANY OF THOSE TYPE OF THINGS THAT IS NORMALLY FOUND WHERE REVOCATION IS ORDERED.

INDEED, WHETHER THIS COURT

CONSIDERS IT OR NOT, WHEN THESE CASES WENT TO TRIAL AND WERE IN FRONT OF 12 JURORS, DR. HUFNAGEL WAS FOUND NOT TO BE NEGLIGENT ON THE SAME MEDICAL RECORDS, THE SAME STANDARD OF CARE. I'M JUST SAYING THAT FROM A STANDPOINT OF THIS COURT'S EVALUATION OF THE PENALTY, HOW CAN REVOCATION BE APPROPRIATE UNDER THOSE CIRCUMSTANCES?

IF IT REALLY IS APPROPRIATE, THEN THIS MEDICAL BOARD SHOULD GO BACK AND TELL US WHY THE PENALTY OF REVOCATION IS JUSTIFIED UNDER THESE CIRCUMSTANCES WHERE THEY DIDN'T HEAR FROM ANYONE OR WHERE THERE'S DIFFERING OPINIONS AMONG EXPERTS. I BELIEVE ON THAT BASIS ALONE THE CASE SHOULD BE GRANTED IN PART, THAT IS, THAT A WRIT SHOULD BE GRANTED IN PART AT LEAST ON THE PENALTY OF REVOCATION.

THE COURT: ALL RIGHT. WELL, IT'S A VALIANT TRY, MR. FRISENDA, BUT I JUST DON'T THINK YOUR ARGUMENT IS RECONCILABLE WITH THE LAW OF THIS CASE, WHICH IS THE DISTRICT COURT OF APPEALS DECISION. AND IF THE DISTRICT COURT OF APPEAL WANTED ME TO REFER THE MATTER BACK TO THE ADMINISTRATIVE LEVEL OR TO EXERCISE MY JUDGMENT ONLY AS TO WHETHER THE PENALTY OF THE ADMINISTRATIVE LAW JUDGE SHOULD BE ADOPTED OR THE PENALTY OF THE BOARD DECREASED RATHER THAN INCREASING THE DISCIPLINE RECOMMENDED BY THE ADMINISTRATIVE LAW JUDGE, IT WOULD HAVE SAID SO.

MR. FRISENDA: YOUR HONOR, I BELIEVE IT DID SAY THAT ON PAGE 28. PAGE 28 OF THE COURT OF APPEALS DECISION SAYS,

"HOWEVER, WE STOP SHORT OF AFFIRMING THE PENALTY OF REVOCATION IN THIS INSTANCE. IT WOULD BE DIFFICULT TO FIND THAT THE PENALTY OF REVOCATION IS NOT GROSSLY EXCESSIVE WHEN IMPOSED SOLELY ON THE BASIS OF TREATMENT RENDERED TO RAMA H. HOWEVER, THE TRIAL COURT ALSO UPHELD NUMEROUS DISHONEST BILLING CHARGES. THE TRIAL COURT INDICATED THAT HAD THE BOARD BASED ITS PENALTY OF REVOCATION ON THESE CHARGES, IT WOULD LIKELY HAVE BEEN UPHELD. HOWEVER, THE COURT DID NOT IMPOSE A JOINT PENALTY FOR THE GROSSLY NEGLIGENT TREATMENT OF RAMA H. AND THE REPEATED ACTS OF DISHONESTY. THE PENALTY OF REVOCATION MIGHT BE APPROPRIATE UNDER THE TOTALITY OF THESE CIRCUMSTANCES."

MR. FRISENDA: AND IT IS THAT "MIGHT," IT IS THAT DIRECTION FROM THE APPELLATE COURT THAT SAYS, WE'RE NOT GOING TO AFFIRM THE PENALTY OF REVOCATION. IT REMANDS IT BACK TO THIS COURT TO EXERCISE ITS INDEPENDENT JUDGMENT IN THAT REGARD. AND, OBVIOUSLY, THE COURT OF APPEALS IS CONCERNED ABOUT THE ISSUE. I BELIEVE THE TRIAL COURT PREVIOUSLY WAS CONCERNED ABOUT THE ISSUE. THE ADMINISTRATIVE LAW JUDGE WAS CONCERNED ABOUT THE ISSUE. AND THIS COURT JUST DOESN'T DEMONSTRATE A PENALTY OF REVOCATION. THERE'S MITIGATING CIRCUMSTANCES. THE MITIGATION CIRCUMSTANCES ARE PRESENT NOT ONLY FROM A

STANDPOINT OF, AGAIN, THE RESULTS IN THOSE OTHER CASES, BUT IN THE RECORD HERE AT THE ADMINISTRATIVE LEVEL. IF THERE WERE INSTANCES OF INCORRECT BILLINGS, THOSE HAVE BEEN CORRECTED NOW. ANY OF THOSE BILLINGS THAT WENT OUT TO ANY PATIENT OR ANY INSURANCE COMPANY WERE ACCOMPANIED BY THE SURGICAL RECORD ITSELF, AND THAT IS REFLECTED IN THE TRANSCRIPT WHICH IS VOLUME ROMAN NUMERAL 14, DECEMBER 9, 1987. AND THAT RECORD REFLECTS THAT THE PERSON IN CHARGE OF BILLING WAS MR. SCHUSTER. MR. SCHUSTER WAS THE ONE WHO DECIDED WHAT IS TO BE BILLED AND WHAT IS NOT TO BE BILLED, AND IN ALL CASES -- AND THIS IS FOUND ON PAGE 8 AND 41 AND 42 OF THAT TRANSCRIPT: IN ALL CASES THOSE BILLINGS WENT OUT WITH COPIES OF THE SURGICAL RECORDS FOR THAT PARTICULAR PATIENT. WHEN THAT PATIENT HAD SURGERY, ONE OF THE REQUIREMENTS AFTER THE SURGERY WAS TO VIEW A VIDEOTAPE OF EXACTLY WHAT HAPPENED. THAT WAS FOR THE PATIENT'S EDUCATION SO THE PATIENT COULD SEE WHAT PROCEDURES WERE PERFORMED. IN ADDITION TO THAT, WHEN BILLINGS WENT OUT TO INSURANCE COMPANIES OR TO THE PATIENTS THEMSELVES, THEY ALWAYS HAD APPENDED THERETO COPIES OF THE ACTUAL SURGICAL RECORDS OR COPIES OF THE ACTUAL DIAGNOSIS. AND THAT'S CONTAINED IN THE ADMINISTRATIVE RECORD.

IF THERE WERE INSTANCES WHERE AN INCORRECT CODE WAS USED, IT WAS CERTAINLY NOT DR. HUFNAGEL'S DECISION AS TO WHICH CODE WAS USED, BUT MR. SCHUSTER'S DECISION AS TO WHICH CODE WAS USED. INDEED, THIS ADMINISTRATIVE RECORD ALSO SUPPORTS THE FACT THAT THERE WAS IN

FACT AN ERROR IN THE SOURCE OR THE REFERENCE MATERIAL CALLED CTP.

SO THOSE FACTORS ARE CLEAR INDICATION OF MITIGATION WHERE, AGAIN, THE PENALTY OF REVOCATION IS CERTAINLY NOT WARRANTED.

IN ADDITION, AS I'VE INDICATED BEFORE, BECAUSE THE MEDICAL BOARD WAS QUICK TO JUDGE WITHOUT HEARING FROM ANY OF THESE WITNESSES, THERE'S ENOUGH IN THIS RECORD SUCH THAT THEY SHOULD GO BACK AND CLARIFY WHY THEY FIND THE BASIS FOR REVOCATION TO BE SUPPORTED.

SO WE HAVE THE COURT OF APPEAL CONCERNED ABOUT IT. I BELIEVE THIS COURT WAS CONCERNED ABOUT IT AT THE ORIGINAL HEARING ON THE TRIAL DE NOVO, AND I BELIEVE ALL THE WAY THROUGH THIS RECORD DOES NOT SUPPORT A PENALTY OF REVOCATION. THE CASE NOW FINDS IN INSTANCES OF REVOCATION, PATIENT DEATHS. AS A MATTER OF FACT, THE MEDICAL BOARD CAN CITE TO NO DECISION, AND IT HAS CITED TO NO DECISION, WHERE THIS TYPE OF RECORD SUPPORTS A REVOCATION. THERE IS NOT ONE CASE CITED BY THE MEDICAL BOARD UNDER THE CASE LAW WHICH WOULD SUPPORT THIS TYPE OF PENALTY UNDER THE CIRCUMSTANCES.

AND IN FACT, WE CITE INSTANCES WHERE EVEN WHERE THERE WERE PATIENT DEATH, EVEN WHERE AT LEAST TWO -- IN THE CASE OF GLOVER V. MEDICAL BOARD, WHICH IS 282 CAL.RPTR. 137 -- IT'S A 1991 DECISION UNDER THE FIRST APPELLATE DISTRICT -- AN INDIVIDUAL DIED. IN COLLINS V. MEDICAL BOARD THERE WAS DANGEROUS LIFE

THREATENING DRUGS KNOWINGLY PRESCRIBED TO PERSONS NOT EVEN UNDER A DOCTOR'S TREATMENT. IN FOSTER THERE WAS FINDINGS THAT THE COURT NOTED AN INTENTIONAL AND PROLONGED DISHONESTY ON THE PART OF THE DOCTOR, BUT EVEN THERE IT SIMPLY PROPOSED A 90-DAY SUSPENSION OF A LICENSE. HERE, THE MEDICAL BOARD BY ITS PENALTY, WHICH IS, WE BELIEVE, NOT SUPPORTED, IS SIMPLY ENDING A CAREER. AND REVOCATION ON THIS RECORD IS JUST NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE. IT'S NOT SUPPORTED BY THE CASE LAW.

THE COURT: ALL RIGHT. THANK YOU.

THE PETITION FOR WRIT OF MANDATE IS DENIED. THE COURT DOES FIND THAT THE WEIGHT OF THE EVIDENCE SUPPORTS THE FOUR FINDINGS THAT THE BOARD MADE, AND THE COURT HOLDS THAT THE PENALTY -- THE BOARD'S DECISION IS SUPPORTED BY THE TOTALITY OF THE FINDINGS THAT ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

THE COURT DOES NOT AGREE THAT THE PENALTY OF REVOCATION IS APPROPRIATE ONLY AFTER A PHYSICIAN KILLS SOMEBODY, AND FINDS THAT THE PENALTY OF REVOCATION IS APPROPRIATE UNDER THE TOTALITY OF THE CIRCUMSTANCES SHOWN BY THE EVIDENCE IN THIS CASE.

COURT IS IN RECESS.

MR. FRISENDA: YOUR HONOR, MAY WE REQUEST THAT THE REVOCATION BE STAYED PENDING REVIEW BY THE COURT OF APPEALS?

THE COURT: I THINK YOU MAY REQUEST

IT. THE REQUEST IS DENIED. IF YOU WANT A STAY, YOU REQUEST IT FROM THE COURT OF APPEAL.

MR. FRISENDA: ALL RIGHT. THANK YOU.

MS. BARRIOS: THANK YOU, YOUR HONOR. WOULD YOU LIKE ME TO PREPARE THE ORDER, YOUR HONOR?

THE COURT: YES, I THINK THAT WE SHOULD HAVE A FINAL JUDGMENT IN THE CASE THAT IS A FORMAL DOCUMENT, SO PREPARE IT, LODGE IT WITH THE COURT AFTER SERVING A COPY ON OPPOSING COUNSEL. THE COURT WILL HOLD IT FOR TEN DAYS BEFORE SIGNING AND FILING.

MS. BARRIOS: THANK YOU, YOUR HONOR.

MR. FRISENDA: THANK YOU.

(PROCEEDINGS CONCLUDED.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 69 HON. DAVID P. YAFFE, JUDGE

V. GEORGES HUFNAGEL, M.D.,	)	
PETITIONER,	)	SUPERIOR COURT NO. C730624
VS.	)	
STATE OF CALIFORNIA, ET AL.,	)	
RESPONDENTS.	)	

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I, DARYL C. CASE, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 25 COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE MATTER OF THE ABOVE-ENTITLED CAUSE IN DEPARTMENT 69 REPORTED BY ME ON FRIDAY, JUNE 7, 1996.

DATED THIS 13TH DAY OF JUNE, 1996.

S/DARYL C. CASE, CSR #8739
OFFICIAL REPORTER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 69 HON. DAVID P. YAFFE, JUDGE

V. GEORGES HUFNAGEL, M.D.)
)
PLAINTIFF,) NO. C 730 624
)
VS.)
)
STATE OF CALIFORNIA,)
et al.,)
)
DEFENDANTS)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MARCH 29, 1996

APPEARANCES:
FOR
PLAINTIFF: FRISENDA,QUINTON & NICHOLSON
BY: FRANK FRISENDA, JR. ESQ.
11755 WILSHIRE BOULEVARD
TENTH FLOOR
LOS ANGELES, CALIF. 90025

FOR DEFENDANTS:
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
GLORIA BARRIOS, DEPUTY
300 SOUTH SPRING STREET
SUITE 500
LOS ANGELES, CALIF. 90013

C O P Y

DARYL C. CASE, CSR# 8739
OFFICIAL REPORTER

LOS ANGELES, CALIFORNIA; FRIDAY,
MARCH 29, 1996
10:02 A.M.

DEPARTMENT NO. 69 HON. DAVID P. YAFFE,
JUDGE

APPEARANCE: (SEE TITLE PAGE.)

THE COURT: NUMBER TEN, HUFNAGEL AGAINST THE STATE.

MR. FRISENDA: GOOD MORNING, YOUR HONOR.

FRANK FRISENDA, FOR THE PETITIONER, DR. HUFNAGEL.

THE COURT: SPELL YOUR LAST NAME, PLEASE.

MR. FRISENDA: F-R-I-S-E-N-D-A.

MS. BARRIOS: GOOD MORNING, YOUR HONOR.

GLORIA BARRIOS, FOR THE ATTORNEY GENERAL'S OFFICE.

THE COURT: ALL RIGHT, MR. FRISENDA, YOU SEEN THE TENTATIVE?

MR. FRISENDA: I HAVE, YOUR HONOR.

THE COURT: ALL RIGHT. WILL YOU SPEAK TO IT, PLEASE.

MR. FRISENDA: MAY I FIRST INQUIRE AS TO WHETHER THE COURT HAS RECEIVED A

REPLY FROM THE PETITIONER THAT WAS FILED ON THE TWENTY-SEVENTH?

THE COURT: YES.

MR. FRISENDA: OKAY. AS STATED IN THE REPLY, ADDITIONAL EVIDENCE IS AUTHORIZED UNDER 1094.5 SUBSECTION E. THAT SECTION ALLOWS THE COURT TO, IN ADDITION TO CONSIDERING THE EVIDENCE RELIED UPON BY THE BOARD, TO ALSO CONSIDER ADDITIONAL EVIDENCE WHICH IS RELEVANT TO THE PROCEEDING.

THE COURT: WELL, THAT MAY HAVE ALLOWED ME TO RECEIVE SUCH EVIDENCE WHEN I FIRST HEARD THIS MATTER, BUT I'M NOW OPERATING UNDER DIRECTIONS FROM THE COURT OF APPEAL.

MR. FRISENDA: THE COURT OF APPEALS IN THAT RESPECT SIMPLY REMANDS THE MATTER. WHEN I SAY SIMPLY: REMANDS THE ENTIRE MATTER BACK TO THE TRIAL COURT FROM A STANDPOINT OF APPLYING WHAT THE COURT OF APPEALS HAS STATED IS THE CORRECT BENCHMARK, THAT IS, THE TRIAL COURT IS NOT TO CONSIDER THE ADMINISTRATIVE LAW JUDGE'S DECISION, WHICH THE MEDICAL BOARD HAS NOT ADOPTED.

ON THE OTHER HAND, THE MANDATE, THAT IS, THE RETURN OF THE CASE ON REMAND, AUTHORIZES THIS COURT TO EXERCISE ITS INDEPENDENT JUDGMENT AND TO DO THAT CONSISTENT WITH THE CASE LAW, AS THIS MATTER AFFECTS A VESTED FUNDAMENTAL RIGHT.

IN FACT, IN THE COURT OF APPEAL

DECISION ITSELF THE COURT OF APPEALS HAS STATED THE TRIAL COURT'S REVIEW OF THE EVIDENCE IN A CASE SUCH AS THIS, WHERE A FUNDAMENTAL VESTED RIGHT IS AT ISSUE, IS AN INDEPENDENT REVIEW OF THE EVIDENCE, AND IT CITES THE CASE OF KEARL V. BOARD OF MEDICAL QUALITY ASSURANCE.

THE COURT: THE PROBLEM I HAVE WITH THIS ARGUMENT, WHICH WAS IN YOUR PAPERS, IS THAT YOU SEEM TO EQUATE THE COURT'S OBLIGATION TO INDEPENDENTLY REVIEW THE EVIDENCE WITH THE COURT'S OBLIGATION TO INDEPENDENTLY REVIEW THE EVIDENCE WITH THE COURT'S OBLIGATION TO ACCEPT NEW EVIDENCE THAT WAS NOT OFFERED IN THE ADMINISTRATIVE PROCEEDING. WHAT DOES ONE CONCEPT HAVE TO DO WITH THE OTHER?

I MEAN, I CAN INDEPENDENTLY REVIEW THE EVIDENCE THAT WAS PRODUCED AT THE ADMINISTRATIVE HEARING.

MR. FRISENDA: VERY TRUE. YOU CAN DO THAT, AND YOU CAN DO WHAT IS AUTHORIZED UNDER 1094.5(E). THAT SECTION SAYS, OR IN CASES IN WHICH THE COURT IS AUTHORIZED BY LAW TO EXERCISE ITS INDEPENDENT JUDGMENT ON THE EVIDENCE, THE COURT MAY ADMIT THE EVIDENCE AT THE HEARING ON THE WRIT WITHOUT REMANDING THE CASE.

I'M JUST QUOTING THE TAIL END OF THAT SUBSECTION.

HERE IT IS THE CASE THAT THAT EVIDENCE COULD NOT HAVE BEEN PRESENTED AT THE BOARD BECAUSE THE DECISION BY THE JURY DIDN'T COME DOWN TILL 1990. THIS

ADMINISTRATIVE HEARING TOOK PLACE PRIOR TO 1990, AND, AS A MATTER OF FACT, THE DECISION OF THE MEDICAL BOARD THAT IS AT ISSUE IS DATED IN 1989.

THE COURT: ALL RIGHT. HAVE YOU GOT A COPY OF THE COURT OF APPEAL DECISION THERE?

MR. FRISENDA: YOUR HONOR, I HAVE IT IN AN EXCERPTED FORM, WHICH IS PART OF THE PETITION FOR WRIT. LET'S SEE IF I HAVE THAT IN MY FILE.

I'M SORRY. I DIDN'T BRING THAT OTHER THAN THE EXCERPT FROM THE APPENDIX OF THE PETITION --

THE COURT: WELL, ON PAGE 23 OF THE COURT OF APPEAL DECISION THE COURT STATES AS FOLLOWS:

> "THE BOARD'S FINDINGS ARE SUFFICIENT UNDER TOPANGA, AND IT THEREFORE FALLS TO THE TRIAL COURT TO INDEPENDENTLY REVIEW THE ADMINISTRATIVE RECORD TO DETERMINE IF THESE FINDINGS ARE SUPPORTED BY THE EVIDENCE."

WHAT DOES THAT MEAN?

MR. FRISENDA: WELL, IT IS TELLING THE COURT TO EXERCISE ITS INDEPENDENT JUDGMENT, AS I QUOTED FROM THE OTHER SECTION OF THE COURT OF APPEALS DECISION, THAT IS, THAT IF YOU LOOK AT THE SAME COURT OF APPEALS DECISION, IT HAS THAT LANGUAGE OF KEARL. KEARL SAYS THAT YOU ARE NOT RESTRICTED TO THE EVIDENCE RELIED

UPON BY THE BOARD. THAT'S WHAT KEARL SAYS.

AS A MATTER OF FACT, IT'S QUOTED IN THE COURT OF APPEALS DECISION. IT SAYS, "THUS THE TRIAL COURT IS NOT IN ITS REVIEW OF THE EVIDENCE RESTRICTED TO THE EVIDENCE RELIED UPON BY THE BOARD, BUT MUST INSTEAD REVIEW THE ENTIRE RECORD TO DETERMINE IF THE WEIGHT OF THE EVIDENCE SUPPORTS THE BOARD'S FINDINGS." THAT'S WHAT THE COURT OF APPEALS DECISION ITSELF SAYS.

THE COURT: BUT WHAT DOES THE COURT MEAN BY "RECORD" IN THAT QUOTATION?

MR. FRISENDA: IN THAT REGARD, I WOULD SUBMIT IT'S OPEN ENDED OTHER THAN TO INSTRUCT THE TRIAL COURT TO EXERCISE ITS INDEPENDENT JUDGMENT CONSISTENT WITH THE LAW.

NOW, THE LAW SAYS --

THE COURT: THE EVIDENCE YOU WANT ME TO CONSIDER UPON REMAND IS NOT IN ANY RECORD, IS IT?

MR. FRISENDA: IT IS OF RECORD OF THIS COURT, THAT IS, OF THE L.A. SUPERIOR COURT IN A MATTER THAT IS SUBJECT TO JUDICIAL NOTICE. THIS IS THE VERY --

THE COURT: SOME OF IT IS. SOME OF IT IS -- YOU WANT ME TO CONSIDER SOME KIND OF SETTLEMENT THAT WAS MADE OF SOME OF THESE CASES?

MR. FRISENDA: SETTLEMENT, WE CAN

CERTAINLY DEFER; AND THE COURT CAN GIVE WHATEVER WEIGHT IT FEELS IT'S ENTITLED TO OR NO WEIGHT AT ALL. BUT FROM A STANDPOINT OF THE COURT OF APPEAL'S DIRECTION TO THIS COURT TO ALSO CONSIDER WHETHER OR NOT THE PENALTY PHASE IS PROPERLY ADMINISTERED BY THE MEDICAL BOARD, THAT MAY BE RELEVANT EVIDENCE TO THIS COURT'S EVALUATION AS TO WHETHER THE PENALTY IS TOO HARSH OR NOT TOO HARSH.

IN ANY EVENT, I THINK THAT WITH REGARD TO THE PATIENT RAMA H., THE COURT OF APPEALS WAS CONCERNED ABOUT THAT. THAT IS, THE COURT OF APPEALS WAS CONCERNED AS TO WHETHER THAT ONE PATIENT WOULD BE SUFFICIENT TO WARRANT THE PENALTY OF REVOCATION, AND THE COURT OF APPEALS EXPRESSLY STATED THAT. I THINK WHAT THE COURT OF APPEALS HAS ALSO SAID IS FOR THIS COURT TO COME BACK, EXERCISE ITS INDEPENDENT REVIEW CONSISTENT WITH THE CASE LAW, CONSISTENT WITH THE CODE, AND LOOK AT THE TOTALITY OF FINDINGS, AND TO USE THAT MEASURE THAT IS THE INDEPENDENT JUDGMENT TEST CONSISTENT WITH THE CODE. AND CODE SUBSECTION (E) OF 1094 SUBPART E AUTHORIZES THIS COURT TO CONSIDER THAT ADDITIONAL EVIDENCE.

AS I SAID BEFORE THE COURT MAY CONSIDER IT AND GIVE WHATEVER WEIGHT THE COURT FEELS THAT IT'S ENTITLED TO. OBVIOUSLY, WE THINK IT'S SIGNIFICANT THAT A JURY, A UNANIMOUS DECISION, FOUND THAT DR. HUFNAGEL WAS NOT NEGLIGENT IN THE CARE AND TREATMENT RENDERED TO THAT PATIENT, RAMA H; MOREOVER, THAT DR. HUFNAGEL HAD NOT MADE ANY MISREPRESENTATION OF PAST OR EXISTING

MATERIAL FACTS.

THOSE ARE EXPRESS FINDINGS BY THE JURY. THAT'S CLEARLY RELEVANT TO WHETHER OR NOT THE MEDICAL BOARD REACHED A PROPER DECISION OR WHETHER ITS DECISION IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE, WEIGHT OF THE EVIDENCE IN THE RECORD.

AND THIS IS A MATTER WHICH IS SUBJECT TO JUDICIAL NOTICE, AND THAT'S THE REQUEST THAT PETITIONER IS MAKING.

THE COURT: MISS BARRIOS.

MS. BARRIOS: YOUR HONOR, WE ARE IN AGREEMENT WITH THE TENTATIVE RULING. JUDICIAL NOTICE IS DISCRETIONARY, AND THERE'S JUST NO RELEVANCE IN DISPOSITION IN MALPRACTICE CASES REGARDING THE DISPOSITION OF DISCIPLINARY PROCEEDINGS FOR ADMINISTRATIVE. THERE'S DIFFERENT STANDARDS, THERE'S DIFFERENT PARTIES, THERE'S DIFFERENT ISSUES BEFORE THE COURT IN CIVIL MALPRACTICE CASES. THAT'S WHY NO COURT HAS ALLOWED THE MALPRACTICE CASES TO COME INTO THE INSTANT PROCEEDING, INCLUDING THIS COURT.

AND THE BOARD DID MAKE A RULING ON ONE OF THE JUDICIAL NOTICE EXHIBITS THAT'S BEEN PROFFERED BY PETITIONER, AND THEY SAID IT DIDN'T AFFECT THE ADMINISTRATIVE CASE. SO THERE'S JUST BEEN A NUMBER OF INSTANCES WHERE PETITIONER HAS TRIED TO GET THESE MATTERS BEFORE THE COURT, NOT EVEN GOING TO SETTLEMENT TRANSCRIPTS, AND THEY ARE JUST NOT RELEVANT. AND THE RECORD IS ALREADY

VOLUMINOUS AS IT IS.

BUT WE DO THINK THAT THE COURT OF APPEAL HAS REMANDED THIS MATTER FOR VERY NARROW ISSUES AND NOT TO CONSIDER THE WHOLE PANOPLY OF EVERYTHING THAT'S GONE ON IN THIS CASE, WHICH IS ARGUABLY QUITE LONG AND COMPLEX.

MR. FRISENDA: YOUR HONOR, IF I MIGHT ADDRESS ONE POINT WHICH I THINK IS SIGNIFICANT, THIS INDEPENDENT REVIEW REQUIRED IN THE CASE OF A VESTED FUNDAMENTAL RIGHT IS SET FORTH BY THE COURT IN BIXBY AND 301 OCEAN AVENUE.

THE COURT: I DON'T HAVE ANY QUARREL WITH MY OBLIGATION TO INDEPENDENTLY REVIEW, I DON'T THINK THAT'S THE POINT. THE POINT IS, WHAT IS IT THAT I'M SUPPOSED TO REVIEW. THAT'S THE POINT.

MR. FRISENDA: WELL, YOUR HONOR, THE COURT IS TO REVIEW BOTH THE ADMINISTRATIVE RECORD FOR ERRORS OF LAW, TO EXERCISE ITS INDEPENDENT JUDGMENT UPON THE EVIDENCE.

NOW --

THE COURT: WHAT EVIDENCE?

MR. FRISENDA: THE FACT THAT MISS BARRIOS SAID, AND IT IS THE CASE, THE ADMINISTRATIVE RECORD WILL SHOW THAT PETITIONER'S COUNSEL ATTEMPTED TO HAVE THE ADMINISTRATIVE BOARD CONSIDER THE DEFENSE VERDICT OR THE SUMMARY JUDGMENT IN THE CASE OF JAN LADEW. THE FACT THAT THE BOARD, ADMINISTRATIVE BOARD, REJECTED

THAT AND SAID WE'RE NOT GOING TO CONSIDER IT IS A MATTER THAT THIS COURT SHOULD REVIEW FROM A STANDPOINT OF WHETHER OR NOT THERE WAS AN ERROR OF LAW MADE AT THE ADMINISTRATIVE LEVEL.

THE COURT: DIDN'T I DO THAT WHEN I HAD THE MATTER UP IN WRITS?

MR. FRISENDA: YOU DIDN'T BECAUSE THAT ISSUE CONCERNED WHETHER OR NOT THIS CASE, THAT IS, THE LIMITED TRIAL DE NOVO, SHOULD BE STAYED PENDING THE OUTCOME OF THOSE CIVIL CASES. THAT IS, THAT WAS THE ISSUE AT THAT POINT IN FRONT OF JUDGE JANOVS AND YOURSELF, WHETHER OR NOT THE ADMINISTRATIVE PROCEEDING AND REVIEW THEREOF SHOULD BE STAYED PENDING THE OUTCOME.

THAT'S NO LONGER THE ISSUE NOW. NOW WE KNOW WHAT THE OUTCOME IS. THE OUTCOME WAS DEFENSE VERDICT IN THE CASE OF HAGGERTY, AND A SUMMARY JUDGMENT IN THE CASE OF LADEW, AND A TOKEN SETTLEMENT OF THREE OTHER PATIENTS, WHICH I THINK IS PERTINENT FROM A STANDPOINT OF THE CONSIDERATION OF THE PENALTY PHASE AND THE FINDING OF THE BOARD THAT DR. HUFNAGEL WAS GROSSLY NEGLIGENT OR INCOMPETENT IN THE TREATMENT OF THE VERY SAME PATIENTS THAT A JURY OR THE COURT FOUND WAS NOT EVEN NEGLIGENT.

SO, AGAIN, THE COURT CAN ASSIGN WHATEVER WEIGHT IT WISHES TO THOSE PARTICULAR MATTERS, BUT I THINK THAT THAT SHOULD BE PART OF THE RECORD ON THIS NEW LIMITED TRIAL DE NOVO.

THE COURT: WHERE IS IT THIS --

MR. FRISENDA: 1094(E).

THE COURT: 1904.5.

MR. FRISENDA: POINT FIVE (E), I'M SORRY.

THE COURT: ALL RIGHT. IF THIS EVIDENCE OF WHAT HAPPENED IN THESE MALPRACTICE SUITS HAD BEEN AVAILABLE AT THE TIME OF THE ORIGINAL HEARING, I WOULD HAVE HAD TO EXERCISE MY DISCRETION AS TO WHETHER IT WOULD HAVE BEEN ADMISSIBLE. I PROBABLY WOULD HAVE APPLIED EVIDENCE CODE SECTION 352. OBVIOUSLY THE -- WHAT HAPPENS IN A -- WHAT WE HAVE HERE IS A DOCTOR IS BEING DISCIPLINED BY THE MEDICAL BOARD, AND SHE COMES IN AND SAYS, "WELL, YOU KNOW, YOU ARE DISCIPLINING ME FOR IMPROPERLY TREATING THESE PATIENTS, AND THEY SUED ME FOR MALPRACTICE AND LOST."

AND THE OBVIOUS PROBLEM WITH THAT KIND OF CONTENTION IS THAT THE EVIDENCE ADDUCED ON BEHALF OF THE PLAINTIFFS IN THE MALPRACTICE SUITS COULD BE COMPLETELY DIFFERENT FROM THE EVIDENCE ADDUCED BEFORE THE BOARD. AND THEREFORE THE RELEVANCE, THE PROBATIVE VALUE OF THIS EVIDENCE OF WHAT HAPPENED IN THE MALPRACTICE SUITS COULD BE VERY SMALL INDEED.

ON THE BASIS OF WHAT I SEE NOW, I DON'T THINK I WOULD HAVE ADMITTED THIS TYPE OF EVIDENCE IN THE FIRST INSTANCE, BUT NOT I', OPERATING UNDER A REMAND FROM

THE COURT OF APPEAL WHICH -- WITH DIRECTIONS TO ME, AND THE DIRECTIONS TO ME SEEM TO BE VERY SPECIFIC AS TO WHAT I'M TO DO, AND I'M TO REVIEW THE ADMINISTRATIVE RECORD. SO THAT'S WHAT IT LOOKS LIKE TO ME MR. FRISENDA.

MR. FRISENDA: YOUR HONOR, MAY I DO ONE THING? THAT IS, I SUBMIT TO THIS COURT THAT THE EVIDENCE OF THE MALPRACTICE ACTION IS THE SAME; NOT IDENTICAL, BUT SUBSTANTIALLY SIMILAR. WE'RE DEALING WITH THE SAME PATIENT, THE SAME TREATMENT RECORD, THE SAME THINGS THAT WERE SAID BY DR. HUFNAGEL TO THE PATIENT "B" IN TERMS OF RECOMMENDING A HYSTERECTOMY OR NOT RECOMMENDING A HYSTERECTOMY. I'D LIKE A CHANCE TO COMPARE THE TWO RECORDS SO THAT THE COURT HAS A CHANCE TO REVIEW THAT, AND MOREOVER THE COURT'S STATEMENT THAT THIS HAS SOMETHING TO DO WITH THE PROBATIVE VALUE, THAT IS, SOMETHING HAVING TO GO TO THE WEIGHT --

THE COURT: I SAID IT DOESN'T, BUT IT WOULD HAVE IF THE EVIDENCE HAD BEEN AVAILABLE WHEN I FIRST HEARD THE CASE.

MR. FRISENDA: SO I THINK FROM THAT STANDPOINT WE'D LIKE TO SUBMIT THAT THE EVIDENCE AT THE ADMINISTRATIVE LEVEL AS WELL AS THE EVIDENCE PRESENTED AT THE MALPRACTICE CASES THAT ARE INVOLVED HERE ARE SUBSTANTIALLY SIMILAR, AND I THINK THAT FROM THAT STANDPOINT WE DO FEEL THAT THE DECISION, THAT IS, THE DECISION RENDERED BY THE JURY, WOULD BE RELEVANT. IT'S HIGHLY RELEVANT IF A JURY HAVING THE SAME INFORMATION CONCLUDES THAT THE

DOCTOR IS NOT NEGLIGENT, AND THEN TO COMPARE THAT WITH THE FINDING OF THE MEDICAL BOARD WITHOUT READING -- WITHOUT SEEING THE CREDIBILITY OF ANY OF THESE WITNESSES, SO DETERMINE THAT SHE'S GROSSLY NEGLIGENT.

THE COURT: I DON'T THINK THAT'S WITHIN THE SCOPE OF THE DIRECTIONS GIVEN TO ME BY THE COURT OF APPEAL, MR. FRISENDA. I THINK THEY HAVE TOLD ME IN NO UNCERTAIN TERMS IN BLACK AND WHITE AND IN PLAIN ENGLISH THAT I'M TO REVIEW THE ADMINISTRATIVE RECORD AND NOT TO GO BEYOND IT. AND I THINK THAT'S WHAT I BETTER DO.

MR. FRISENDA: ALL RIGHT.

THE COURT: SO I'M GOING TO DENY YOUR MOTION.

MR. FRISENDA: ALL RIGHT. YOUR HONOR, MAY I ALSO SUGGEST THAT MISS BARRIOS AND I HAVE HAD AT LEAST SOME PRELIMINARY SETTLEMENT DISCUSSIONS. I WOULD LIKE TO REQUEST OF THE COURT WHETHER THEY CAN SET THE MATTER FOR A SETTLEMENT CONFERENCE IN ADVANCE OF OUR HEARING DATE FOR THE LIMITED TRIAL DE NOVO.

MISS BARRIOS: WELL, YOUR HONOR, ACTUALLY, WE ARE SET FOR MAY 10TH, AND I'D LIKE TO STAY WITH THOSE DATES.

MR. FRISENDA: I HAVE NO PROBLEM WITH MAY 10TH HEARING DATE ON THE TRIAL DE NOVO, BUT I THINK IF WE CAN HAVE OUR SETTLEMENT CONFERENCE IN ADVANCE OF THAT,

THIS MATTER HOPEFULLY OR POSSIBLY CAN BE DISPOSED OF.

MS. BARRIOS: YOUR HONOR, MR. FRISENDA IS MUCH MORE OPTIMISTIC ABOUT SETTLING THIS MATTER THAN WE ARE. AND WE ARE NOT -- WE DON'T BELIEVE WE HAVE TO HAVE A SETTLEMENT CONFERENCE BEFORE MAY 10TH.

THE COURT: WELL, I'M WONDERING ABOUT THAT TOO. THIS IS NOT A CIVIL PROCEEDING. THERE'S NOT THE -- THIS IS NOT A DISPUTE BETWEEN TWO PRIVATE PARTIES THAT THE COURT SHOULD BE PROMOTING THE IDEA OF SETTLEMENT WITH RESPECT TO. THIS IS A MATTER AFFECTING THE LICENSURE OF A DOCTOR TO PRACTICE MEDICINE IN THIS STATE. IT'S A MATTER AFFECTED WITH A VERY IMPORTANT PUBLIC INTEREST. IS THAT INTEREST PROMOTED BY HAVING THIS CASE RESOLVED BY THE TWO PARTIES GETTING TOGETHER IN A SMOKE-FILLED ROOM AND WORKING OUT SOME SORT OF COMPROMISE? WHY SHOULD I WANT TO PROMOTE THAT:

MR. FRISENDA: I THINK, NUMBER ONE, THE CASE HAS BEEN KICKING AROUND FOR ALMOST TEN YEARS, AND IT'S OBVIOUS --

THE COURT: WELL, I THINK DR. HUFNAGEL WOULD JUST AS SOON IT KICKED AROUND FOR ANOTHER TEN.

MR. FRISENDA: THAT'S NOT THE CASE. THIS REPRESENTS A CLOUD, AND NOT A SMOKE-FILLED CLOUD, OVER DR. HUFNAGEL'S LICENSE. I THINK THE DISCUSSION THAT WE'VE HAD IS VERY PRELIMINARY AND CONSISTENT WITH THIS COURT'S FINDING AT

THE FIRST TRIAL, PUTTING HER BACK ON PROBATION. IF THERE'S A PROBATIONARY PERIOD FOR A COUPLE OF YEARS, AND THE MEDICAL BOARD FEELS THAT THEY HAVE SOMETHING NEW, THEY CAN COME IN ON A PROBATION VIOLATION OR COME IN ON SOME NEW ACCUSATION AND NOT LOOK AT A STALE RECORD.

IN THIS CASE, ONE OF THE PRINCIPAL PROBLEMS IS THAT THE MEDICAL BOARD SIMPLY VOTED NOT TO ADOPT THE ADMINISTRATIVE LAW JUDGE DECISION. HE'S THERE, SITTING THERE FOR 28 DAYS, SEEING THE WITNESSES LIVE.

THE COURT: MR. FRISENDA, I BOUGHT THAT ARGUMENT WHEN YOU MADE IT BEFORE, AND I WAS REVERSED BY THE COURT OF APPEAL.

MR. FRISENDA: ONLY BECAUSE THE COURT, THAT IS, THE TRIAL COURT, RELIED UPON THE ADMINISTRATIVE LAW JUDGE'S DECISION AS OPPOSED TO THE UNDERLYING RECORD. SAME RESULT. JUST SIMPLY HAS TO COMPARE THE SAME EVIDENCE AND SEE THAT THE MEDICAL BOARD HERE COULD NOT REPLY ON ANY CREDIBILITY --

THE COURT: THAT'S WHAT THE COURT HAS TOLD ME TO DO, GO BACK AND LOOK AT THE EVIDENCE PRESENTED IN THE ADMINISTRATIVE PROCEEDING AND SEE IF WHAT THE BOARD DID IS SUPPORTED BY THAT EVIDENCE. AND I'M GOING TO EXERCISE MY INDEPENDENT JUDGMENT WITH RESPECT TO THAT.

MR. FRISENDA: I KNOW YOU WILL, BUT

IT'S A 28-VOLUME TRANSCRIPT. THERE'S HUNDREDS OF EXHIBITS. IF WE CAN MAKE PROGRESS AT A SETTLEMENT CONFERENCE, EVEN IF IT'S FOR --

THE COURT: MR. FRISENDA, I'M NOT GOING TO ORDER A SETTLEMENT CONFERENCE. IT DOESN'T SOUND TO ME LIKE IT'S IN THE PUBLIC INTEREST FOR ME TO DO IT IN THIS MATTER.

MOTION IS DENIED.

NOTICE WAIVED?

MR. FRISENDA: NOTICE WAIVED.

MS. BARRIOS: YES, YOUR HONOR.

MR. FRISENDA: YOUR HONOR, WITH REGARD TO THE HEARING DATE ON MAY 10TH, THE COURT HAS NOT SET A BRIEFING SCHEDULE. WHEN WOULD YOU LIKE BRIEFS ON THAT, ON THE NEW TRIAL DE NOVO. JUST WITHIN THE 15 DAYS?

THE COURT: ALL RIGHT. LET'S SET A BRIEFING SCHEDULE SO YOU'LL KNOW WHAT YOU ARE FACING HERE. NOW, LET ME MAKE IT CLEAR THE ISSUES THAT I EXPECT TO BE BRIEFS ARE THE PRECISE ISSUES THAT THE COURT OF APPEAL HAS TOLD ME I'M SUPPOSED TO REVIEW. I DO NOT INTEND TO GO BACK TO STEP ONE ON THIS PROCEEDING. I INTEND TO DO PRECISELY WHAT THE COURT ON APPEAL HAS TOLD ME I'M SUPPOSED TO DO HERE, AND I WANT THE BRIEFING TO REFLECT THAT SCOPE OF INQUIRY.

MR. FRISENDA: ALL RIGHT.

THE COURT: I THINK THERE ARE SOME FIVE FINDINGS THAT I'M SUPPOSED TO REVIEW.

MR. FRISENDA: IN ADDITION TO THE FIVE FINDINGS THE COURT EXPRESSLY SAYS GO BACK AND LOOK AT THE TOTALITY OF THE FINDINGS, AND I BELIEVE THAT THE --

THE COURT: WELL, WHAT I'M SUPPOSED TO LOOK AT, OBVIOUSLY, IS THE WHOLE RECORD.

MR. FRISENDA: THAT'S RIGHT.

THE COURT: BUT WHAT I'M SUPPOSED TO REVIEW IS SPECIFICALLY DELINEATED FOR ME BY THE COURT OF APPEAL.

MR. FRISENDA: AT PAGE 30 OF THE COURT OF APPEALS' DECISION IT MENTIONS FIVE FINDINGS, AND THEN IT SAYS, THE TOTALITY OF THE FINDINGS. I MEAN, LIKE IT OR NOT, THE COURT OF APPEALS SAYS --

THE COURT: PAGE 30?

MR. FRISENDA: THIS IS PAGE 30, THE TAIL END OF THE DECISION.

THE COURT:

> "WE REMAND FOR THE TRIAL COURT TO EXERCISE ITS INDEPENDENT JUDGMENT AS TO WHETHER THE BOARD'S FINDINGS NUMBERED, 4, 7, 13 AND 47 ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE AND TO REDETERMINE WHETHER THE BOARD'S DECISION IS

SUPPORTED BY THE TOTALITY OF
THE FINDINGS FOUND TO BE
APPROPRIATELY SUPPORTED."

MR. FRISENDA: RIGHT. SO I THINK FROM THAT STANDPOINT, AS I SAID, THE -- BECAUSE THE TRIAL COURT HAD USED THE ADMINISTRATIVE LAW JUDGE DECISION AS THE BASIS FOR FINDING THAT CERTAIN FINDINGS AT THE ADMINISTRATIVE LEVEL WERE NOT SUPPORTABLE, COURT OF APPEALS IS SAYING, GO BACK AND LOOK AT THE EVIDENCE ITSELF, NOT THE ADMINISTRATIVE LAW JUDGE'S DECISION, AND EXAMINE THE TOTALITY OF THE FINDINGS TO DETERMINE WHETHER THEY ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

THE COURT: WELL, WHAT I HAVE TO LOOK AT IS THE TOTALITY OF THE BOARD'S FINDINGS TO FIND WHETHER THEIR DECISION AS TO WHAT TO DO WITH OR TO DR. HUFNAGEL IS SUPPORTED BY THEIR OWN FINDINGS.

MR. FRISENDA: THAT'S RIGHT, AND THE WEIGHT OF THE EVIDENCE. IN OTHER WORDS, THEY SAY TO READ --

THE COURT: THERE'S TWO SEPARATE QUESTIONS. ARE THE FINDINGS SUPPORTED BY THE EVIDENCE, AND, IS THE DECISION SUPPORTED BY THE FINDING -- IS THE PUNISHMENT SUPPORTED BY THE FINDING. THOSE ARE THE TWO SEPARATE QUESTIONS.

MR. FRISENDA: THAT'S RIGHT.

THE COURT: AL RIGHT. I WANT THE BRIEFING TO REFER TO THOSE QUESTIONS AND ONLY THOSE QUESTIONS.

ALL RIGHT. I GUESS PETITIONER SHOULD GO FIRST. WE'VE GOT A MAY 10TH HEARING DATE SO YOU'VE ESSENTIALLY GOT THE MONTH OF APRIL TO DO THESE BRIEFS. WHAT ABOUT APRIL 15TH FOR THE PETITIONER, APRIL 26TH FOR THE OPPOSITION, AND THEN MAY 3RD FOR THE REPLY.

MR. FRISENDA: THAT'S FINE.

THE COURT: DOES THAT SOUND REASONABLE, MISS BARRIOS?

MS. BARRIOS: YES.

THE COURT: OKAY. THAT WILL BE THE ORDER.

MR. FRISENDA: OKAY. THANK YOU VERY MUCH.

MS. BARRIOS: THANK YOU, YOUR HONOR.

THE COURT: AND SEND THESE TO EACH OTHER BY HAND DELIVERY OR FAX SO THAT YOU DON'T USE UP THE TIME IN THE MAIL.

MR. FRISENDA: YOUR HONOR, COULD WE ALSO HAVE SOME EXPANSION OF THE 15-PAGE LIMIT, CONSIDERING THE EXTENT OF THE UNDERLYING RECORD?

THE COURT: YES.

MR. FRISENDA: AND CAN WE HAVE UP TO 35 PAGES?

THE COURT: YES.

MR. FRISENDA: ALL RIGHT. THANK

YOU.

MS. BARRIOS: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 69 HON. DAVID P. YAFFE, JUDGE

V. GEORGES HUFNAGEL, M.D.,	)	
PETITIONER,	)	SUPERIOR COURT
	)	NO. C730624
VS.	)	
	)	
STATE OF CALIFORNIA, ET AL.,	)	
RESPONDENTS.	)	
	)	

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I, DARYL C. CASE, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 16 COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE MATTER OF THE ABOVE-ENTITLED CAUSE IN DEPARTMENT 69 REPORTED BY ME ON MARCH 29, 1996.

DATED THIS 4TH DAY OF APRIL, 1996.

S/DARYL C. CASE, CSR #8739
OFFICIAL REPORTER